

~~Lightfoot~~
Lane K Betts
THE
LAW
AND
PRACTICE
OF

Distresses and Replevin;

By the late Lord Chief Baron GILBERT.

To which is added,

An APPENDIX of PRECEDENTS.

The SECOND EDITION,

With considerable ILLUSTRATIONS,

By a BARRISTER at LAW.

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P R E F A C E.

T O T H E

F O R M E R E D I T I O N .

AS *solidity of judgment, utility of matter, and perspicuity of method, will be too obvious to every intelligent reader, on the first perusal of the following Treatise, not to convince him that it is one of the elaborate pieces of the late lord chief baron GILBERT, we presume there needs no further apology for making it publick, especially since it is a subject essentially necessary to be known by every individual who has any kind of inheritance or possession; for it is calculated in such a manner*

P R E F A C E.

as to be of use to the public in general, but more particularly to sheriffs, undersheriffs, stewards, landlords, tenants, &c. who ought to be thoroughly acquainted with this branch of the law.

The translations at the bottom of the pages are intended that this book may be useful not only to gentlemen of the law, but to such also as are unacquainted with the original.

An appendix of some well chosen precedents is added for the ease of the practiser, and the whole rendered the best and compleatest book of its kind.

ADVER-

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TO THE

PRESENT EDITION.

SOME time since, the publisher of the present edition of this work, prevailed on a gentleman, well known at the bar, to revise it, and make such additions, as to him should seem necessary. This, he flatters himself, has been done in a manner not undeserving of the attention of the profession. The work has received a very minute correction, as well in language, as in punctuation. The references have been all carefully examined; those that were inapposite have been retracted, those that were inaccurate have been rectified, and such as were necessary have been supplied. The divisions have in some measure been altered; at the same time that others have been

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added. Such of the modern acts of parliament, as well as of the judicial decisions, which in any wise relate to the subject, have been introduced : and to the whole is subjoined a few practical directions, as also a new and complete index. That the reader may entertain a competent idea of the necessary alteration which this treatise has undergone, it may not be improper to remind him, that ALL the ADDITIONS are included within brackets : it was candid so to denote them, lest the faults of the editor should be attributed to the author. The “ translations at the bottom of the pages ” which disgraced the former edition, the editor of this has thought proper to omit.

March 1st, 1780.

THE

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(i)

THE
LAW
OF
DISTRESSES
AND
REPLEVINS.

CHAP. I.

OF DISTRESSES.

THE distress is a remedy given to the lord, to recover the rent or services, which the tenant hath obliged himself by his feudal contract to pay, by way of retribution for his farm.

These services, when the feudal tenures prevailed, were chiefly of two sorts; either **MILITARY**, as attending on the lord in war; or **MINISTERIAL**, as attending his courts in time of peace, and there assisting him in the distribution of justice; or, ploughing and tilling his demesne.

Spel. Rem. 40.
Bacon on
Government.
47.
Ranning-
ton's edit. of
Hale.

B

The

The non-performance of these services was, by the old feudal law, a forfeiture of the feud. This is evident from several passages in *Vigellius*, (under the title of *causæ ex quibus feudum amittitur*)—*Si vassalus domino non serviat, fidelitatemque ei non præstet*—*Si vassalus, a domino ejus vocatus, non venerit*—*Si pactum feudi non servietur*—These, says he, were all forfeitures, and the lord on such failures of his tenant, was at liberty by that law to re-assume his feud.

Vigel. 257,
271. 326.
Jur. feud.
Ann. 126.
129.
Run. edit. of
Hale.

Bacon on go-
vernment,
48.

The rigour of this law was mitigated with us, and these feudal forfeitures changed into distresses, according to the pignorary method of the civil law; from whence the notion seems to have been first borrowed; as may be seen in the title, *de districtione pignorum*.—*Creditoris arbitrio permittitur, ex pignoribus sibi obligatis quibus velit districtis, ad suum commodum pervenire*. For there appear no footsteps of it in the feudal authors.

Dig. lib. 20.
tit. 5. fol. 660.

From whence soever the name or the notion came, the remedy obtained so early in our law, that we have no memorial of its original with us; and as this power was anciently used by the lords, it grew as burthensome and grievous to tenants, as the feudal forfeiture;—there being no difference to the tenant, between the lord's seizing the land itself and turning him out of possession, and his stripping him of the whole produce of it at his pleasure.

And

And not only the produce of the farm, but the *inducta & illata*, and every thing that was brought on the land, were liable to the lord's distress. By this means all the plunder of the war, which the vassal had brought home, was often carried off by the lord, and the distress, by his power, removed out of the reach of the tenant; and that on the slightest occasions.

This power, thus practised by the lords, did not only oppress the tenants, but put them so entirely under the power of their lords, as to enable them to bring great numbers of vassals into the field against their prince and thereby disturb the publick peace of the kingdom.

Barr. on stat.
12. 13. 51.
Madox Ex. c.
13. stat. marl.
Sulliv. lect.
101. 102.

There were yet two other inconveniencies which arose from the abuse of these distresses.

The first was, that in the disputes which frequently arose between neighbouring lords themselves, whilst each lord was endeavouring to enlarge his bounds and encroach on his neighbour's property, the tenants were generally distrained by both; by which the tenant was brought within the seignory, and so became subject to that feudal dependence and service which accompanied the military tenure.

The other mischief was, that when the lords had brought them under their dependence, they would distrain them for the amerciaments of their courts; and, as the

- 52 Hen. 3. c. 1. statute of Marlbridge expresses it,—*graves ultiones fecerunt, & districtiones quousque redemptiones receperint ad voluntatem suam.* And what made the abuses the more insupportable, was, that the lords—*per ministros domini regis justiciari non permittunt, nec sustineant quod per ipsos liberentur districtiones, quas auctoritate propria fecerint ad voluntatem suam.*—So that they seemed to throw off the authority of the law, and to subvert the fundamental rule, that no property was to be altered without the king's writ.

But these oppressions ended with the distractions of the barons wars. For towards the end of the reign of Hen. 3. there were particular laws made to regulate the manner of distraining; not permitting the lords to extend this remedy, beyond the mischief it was first introduced for; which was no more than to empower the lord by seizing the chattles, TO OBLIGE the tenant to perform the feudal services.

Brac. l. 3. p. 130. Spelm. AS PLEDGES to compel the performance; voc. eſcheata. and the detention was no longer lawful, than Glan. l. 7. c. 17. Heng. while the tenant refused to do the services, parva, c. 6. which were reserved by the feudal contract. Co. Lit. l. 1. c. 1. Dalrym. By what steps it came to be brought under the regulations which govern it at this day, on feud. prop. we shall have occasion to observe, by considering, 62. ed. 1757. Sullivan. lect. 65. 97. 100. ed. 1776.

I. The several sorts of distresses, and in what cases a distress lies.

II. What

THE LAW OF DISTRESSES.

5

II. What things are distrainable.

III. [Of the time, place, and manner of making the distress.]

IV. How the distress is to be used [and disposed of;] and herein, of the POUND; [and of selling the distress.]

I. Of the several sorts of distresses, and in what cases a distress lies.

The distress at common law was used in six cases; viz.

1. For the service due to the lord arising from the tenure; as homage, fealty, rent, suit of court, &c. For the distress, as is already observed, came in, in lieu of the forfeiture, and was a mild alteration of the feudal law, which allowed the lord to seize the feud for the non-performance of the services. 1 Ro. abr. 665.

[Rents at common law, are of three kinds; rent-service, rent-charge, and rent-seck.

Rent-service, is where the tenant holdeth land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by other service, and certain rent. It is called rent SERVICE, because it hath always some CORPORAL SERVICE incident to it; which at the least is fealty. And in case it be not paid at the day appointed, the lord may distrain for it of common right, without reserving any special power of distress. Co. Lit. 96. a. 142.

Co. Lit. 143. *Rent-charge* is rent, for which the owner may distrain, not of common right, but by virtue of a clause in the deed which creates it.

Co. Lit. 143. *Rent-seck, redditus ficcus*, or dry rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress. And for this species of rent there was no remedy by distress at the common law; but the grantee could only have charged the person of the grantor, in a writ of annuity.

2 Inst. 19. There are also other species of rents, which are reducible to these three; such as, rents of assise, chief rents, &c.

Rents of assise, are the certain established rents of freeholders, and antient copyholders; and are so called, because they are *assised* and certain; and of these, the former are frequently called chief rents.

Having given this general division of rents, it remains to be observed that the difference between them, in respect to the mode of recovering them by distress, is now totally abolished by the 4 G. 2. c. 28. §. 5. which declares, that all persons may have the like remedy by distress for rents seck, rents of assise, and chief rents, as in case of rents reserved upon lease.—So that now it may be laid down as an universal principle, that a distress may be taken for any kind of rent in arrear.

And

And by the 11 G. 2. c. 19. §. 18. if any tenant shall give notice of his intention to quit the premises, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time; he shall from thenceforth pay double rent, to be recovered in like manner as the single rent.]

So the lord may distrain for relief—*aid* 1 Rol. abr. 665. 4 Co. 49. b. 1 Jones 132. Latch. 129.
pur file marrier, and *pur faire fitz chevalier*.
 For though these were not annual, yet they were parts of the feudal profits, and were therefore recoverable in the same manner.

But it may be necessary to distinguish relief, into the relief proper and improper.

The PROPER relief is the ancient relief, which was due to the lord at or before the entry of the heir, or new tenant, into the land. This was anciently paid in money, and was not so properly a service, as a requisite or incident to the feudal tenure. It arose from this, that whilst the feud was temporary and precarious, the lords used upon the death of their tenants, and before the heir was admitted into the feud, to oblige the heir to pay a sum of money. This, after the feud came to be established, and made perpetual, came to be part of the feudal profits; the tenants easily consenting to it upon the establishment of the feud.

Co. Lit. 87.
 a. Spel. Rem. 32.
 1 Jon. 132.
 Latch 130.
 3 Bulst. 323.
 Run. edit. of Hale.

In analogy to this, the lords, after *magna charta* had indulged to the tenants the licence of alienation, used in their grants to reserve a sum of money on every alienation of their tenants; and where such reservation appeared in their grants, with a clause of distress, the lord might resort to that remedy where the tenant failed to perform his part of the contract. It afterwards happened that the grants in which these reservations appeared, were by length of time worn out or lost, and then the lords PRESCRIBED in taking the relief. But for these prescriptive reliefs, the lord could not distrain, unless he could likewise prescribe in the distress. For as the prescription created the right to this IMPROPER relief, so there must be a prescription to give the remedy; otherwise they were looked upon as burdens and exactions of the lords upon their tenants, tending to disable them from appearing in the field, armed and equipped for the publick service: and for that reason were said to be against common right; that is, against the policy of the law, which provided for the publick safety, before the private profit of the lord. And therefore they were not encouraged, nor any remedy either by distress, or action, given for them, unless the lord could shew as early a title to the remedy, as to the duty itself.

In like manner the heriot is of two sorts; the heriot service and the heriot custom.

The

The heriot NOW is the BEST BEAST of the Spelm. Rem. tenant, but anciently was taken out of the ^{32.} *militiæ apparatus*. It was a device first introduced to keep a conquered nation in subjection, and to support the publick strength and military furniture of the kingdom, by taking on the death of the tenant his best armour. Hence it became part of the services arising from the tenure, and therefore to be distrained for as other services. This, as the military service declined, was turned into something of private profit to the lord; and instead of the *militiæ apparatus*, he took the best horse, ox, or cow; and the same remedy was continued, as where the heriot was paid in the habiliments of war.

The reservation of this heriot service was of publick utility. It was also for the private safety of all the tenants in the manor, that the habiliments of war should be kept amongst themselves for their defence; and therefore where there was no such tenure between the lord and tenants of some particular manor, the tenants by agreement consented that the lord should have the best part of the military furniture. This agreement created a custom, which being the law of the manor, created a right in the lord to seize.

Bro. Abr. tit.
Heriot, pl. 7, 8.
Keilw. 82. a.

But the lord could not distrain; because wherever there was any footsteps of a distress, it was always supposed to be part of the feudal reservation: and the heriot custom arising originally from the grant of the tenant,

tenant, and not being reserved by the lord upon his feudal donation, was not a service arising from the tenure between lord and tenant; and therefore was not under the regulation of feudal services, and consequently not to be distrained for, as such services were.

Keilw. 82. a. But where such heriot custom obtains,
 Bro. abr. tit. the property of the heriot is actually in the
 Heriot, pl. 7. lord upon the death of the tenant; because
 Show. 81. the choice of the best beast is in the lord,
 Salk. 356. and not in the tenant. And hence it is, that
 Cro. Car. 260. the lord may seize the heriot custom where-
 ever he finds it, either on the tenant's land,
 or off it, or even in the king's highway.
 And if it be eloigned he may have trespass
 or detinue for it; for the bringing the ac-
 tion determines the choice for that beast,
 as if he had seized at first; and whoever
 takes it, violates the property, which was
 vested in the lord by the death of the te-
 nant. But in the case of such eloignment
 the lord cannot distrain the tenant, as he
 may for the heriot service; because the di-
 stress was introduced for the recovery of
 feudal duties, of which the heriot custom is
 no part.

Plowd. 96. But it hath been much doubted whether
 Keilw. 82. a. the lord might SEIZE the heriot SERVICE;
 Bro. tit. heriot because that being part of the feudal duties
 pl. 7. arising from the tenure between the lord
 3 Bulst. 325. and tenant, ought to be governed by the
 Dr. & Stud. same regulations with the other services; and
 74. therefore where the tenant holds by a capon,
 Moor 540. or a hen, &c. the lord must distrain, and
 Cro. Eliz. 32. cannot

cannot feize as for his own property; so Show. 81.
 neither ought he to feize for a heriot ser- 2Lutw. 1367.
 vice. But it now seems to be settled, that
 the heriot service is feizable, as well as the
 heriot custom; because the choice of the
 best beast is in the lord, and therefore he only
 is to determine that choice, by a seizure.
 But where the tenure is by the rent of a hen
 or a capon, &c. he is to render, and there-
 fore the lord can only compel him to do it
 by distress.—[But a suit heriot reserved by
 deed, cannot be taken off the manor. Show.
81.]

2dly. The second sort of distress is for Cro. Jac. 382.
 fines and amerciaments in court leets. This 1 Ro. Abr.
 stands upon a different bottom. The for- 664.
 mer distress only relates to private con- 8 Co. 38, 41.
 tracts between landlord and tenant;—this 11 Co. 45.
 distress relates to transactions in a court of
 justice, and is allowable either for a fine im-
 posed by the steward, or for amerciaments
 assessed by the jury on persons guilty of
 nuisances; or of any other crime presentable
 or conusable in the leet.

But for amerciaments in a court-baron,
 the lord cannot distrain, but is put to his
 action of debt for recovery thereof.

To understand this rightly, we must ob-
 serve that court leets were originally derived
 out of, or rather exemptions from, the
 sheriff's torn, and therefore are courts of re-
 cord, as the torn is.

In

In those leets, though the lord or his steward presides as judge, yet the court is *curia domini regis*, and was at first established to punish trespasses and publick nufances, which arose within the precincts of the leet, as the torn through the whole county. Hence it comes that in all things necessary for the support of the jurisdiction of the court, the judge was armed with the same power with the judges above; and therefore the steward for any contempt in court might impose a fine, and imprison for it, as the judges above:—because, what is necessary for the vindication of the honour of the court, the steward is not obliged to go to a superior court to seek redress for. But for an amerciamment, which is imposed for a transgression out of court, of which the court has cognizance, there was no fine or imprisonment; because that court could only try lesser offences, which were not fineable; the greater offences being remitted to the justices in eyre. This fine for contempt in court, when imposed, being grounded on the judgment of the king's court of record, CREATED A DEBT, for which the steward might either imprison, or levy the same on the goods and chattels of the debtor; but for the amerciament the steward could ONLY DISTRAIN, and not fine and imprison.

Dal. Sher.
401.
Finch 125.
8 Co. 41. b.

The process that levies this debt, is in the books called a distress; because the lord might at common law impound the distress until the fine was paid;—but as the *distringas* or *levari* for levying those fines and

and amerciaments issued in the king's name; and as the lord may likewise sell this distress, it is rather to be esteemed IN THE NATURE OF AN EXECUTION, than a distress, in the genuine sense of the word;—the distress originally being no more than a pain on the tenant, and a pledge in the lord's hands to compel the tenant to perform the services,—and therefore could not be sold,—till the stat. 2 *W. & M.* c. 5.

[That a power to sell the goods distrained for rent, so necessary to make the rent effectual, should not have been introduced at a more early period, is somewhat surprising.]

And hence it hath been held, that the 5 *Co.* 38, 41. steward may impose a fine upon a man for refusing to be sworn a constable, and may distrain for that fine.

So if a man oweth suit to the sheriff's Dalt. Sher. torn, and refuseth to be sworn, or if a bailiff 400. of a leet refuseth in court to execute his office; these are all contempts to the authority of the court; and the steward may impose a fine, and levy it by distress of the offender's goods.

So if a man oweth suit to the sheriff's Dalt. Sher. torn, and doth not make his appearance, 401. he may be amerced and distrained for the Bro. tit. distr. pl. 8. same; because it is a contempt to the court Fitz. abr. tit. avowry, pl. in refusing obedience to their lawful com- 194. mands.

THE LAW OF DISTRESSES.

mands. But *qu.* whether this be properly an amerciamment.

The difference between fines and amerciamments is, that the fine was *pro gravioribus delictis*,—the amerciamment *pro minoribus*.

The *graviora delicta* were punished either by the view of the judge himself, as fines for contempts done in courts, or on a view of nufances; but out of court by the justices of the peace, or upon indictment, or other conviction.

Of such *graviora delicta*, the fine is set by the court itself, because such *graviora delicta* must be against the king's peace, the quantity of which the court are judges of, who have commission from the king to see that such peace be preserved. In such cases, the jury are only judges whether the defendant be guilty of the fact or not; but the court is judge of the quantity of the fine. It is called a fine, because it ends with the court, and is not to be affected by the jury.

In *minoribus delictis*, as for not appearing at the court leet, or torn, the judge may order the jury to afeer an amerciamment on such a defaulter, and issue a *distingas* for levying the same.

But it seems that at the assizes and sessions, where the judges and justices sit by an immediate commission from the king to keep the peace of the county, the non-appearance

pearance of suitors to make enquiries for breaches of the peace is among the *graviora dilecta*;—so that there the court hath power of itself to impose a fine, which must be estreated into the Exchequer to be levied.

And so where the king grants to any corporation a power to hold sessions, if such court fines for non-appearance, such fines must be estreated into the exchequer, and levied by the process of that court; and such corporation, though they have the grant of such fines from the crown, cannot get them out of the exchequer but by petition, or *monstrans de droit*.

And if instead of fining such persons, the sessions order that they be amerced, and the jury affect the amerciaments, they may be levied by *distringas*.

But court barons were instituted for the Cro. Eliz. private advantage of the lord, and the 74th. ease of the tenants of the manor;—*curia domini manerii*, in which the suitors are judges; and their amerciaments being imposed only for the lord's advantage, and for not doing suit to his courts, or performing the services due to him, such amerciaments are not grounded on the judgments of the king's courts, or courts of record; and therefore only created a debt for the lord, to be sued for in the king's court, that the justice of it might be there CONTROVERTED; for which reason the law never allowed the lord to distrain

for those amerciaments in either of the ways abovementioned. For the lord ought not to have a distress for them in the nature of an execution, because that were to alter property without the king's writ, or the process of the king's courts. Nor was it reasonable to allow the lord to distrain and impound for these amerciaments, because they were set, among other causes, for not doing suit to the lord's court and other services arising from the feudal tenure, and were in nature of a penalty inflicted on the tenant for the non-performance thereof; for which the lord might distrain by virtue of the feudal grant, and therefore ought not to distrain for the amerciament too. That were in effect to allow the lord a double distress for the same thing;—for the service itself, and for the amerciament;—which is the penalty for the non-performing that service; which were vexatious, and would put the tenant too much in the power of the lord.

11 Co. 45. a. But if the lord can PRESCRIBE in a di-
Ro. abr. 666. stress for the amerciament, then the distress becomes lawful; because such a prescription is presumed to be founded on a grant of the tenants, by which they subjected themselves to the distress. And though the grant which created the distress, be worn out by length of time, yet the continual usage is good evidence of it; and therefore the tenants must submit to that custom which their ancestors have put them under.

But

But if the manor belongs to the crown, Cro. Eliz. 748.
 the king by his prerogative may distrain Rowleston v. Alman.
 the tenants for amerciaments imposed in his
 court baron, without prescription; because
 it is of publick advantage that the king's
 treasure should be collected in the most ex-
 peditious manner.

There is, however, this distinction to
 be observed in fines imposed by a court
 leet. They are either imposed by a stew-
 ard for a contempt to the court,—and
 this is absolutely necessary for the support
 of the authority and dignity of the court
 within the boundaries of its duty;—or
 else they are imposed as a punishment for
 those crimes which are conusable by the
 court. But where by custom the leet hath
 jurisdiction to impose a fine, for a thing not
 originally within the jurisdiction, but only
 acquired by custom, in such case, as that
 particular custom gave the leet a right to
 impose the fine, so the custom only can
 create the right of distress.

Thus where a leet laid a custom for a Vent. 105.
 township to send one to be sworn constable, Pierston v.
 which not being done, a fine was imposed, Ridge.
 and a distress taken for it, the distress was Raym. 204.
 held unlawful; because there the steward S. C.
 of the leet did not prescribe in the distress,
 and nothing else could warrant it.

So it is, *pro certo letæ*; which was a sum 11 Co. 44. b.
 given by the tenants to reimburse the lord Rol. Rep. 32.
 for the purchase of the leet; and for this the Godfrey's
 lord cannot distrain without a custom to war- case.
 rant 2 Leon. 74.
C 3 Leon. 178

rant the distress; because this is a sum purely of private advantage to the lord, and in no sort necessary to be paid to keep up the jurisdiction of the court.

3 Co. 41. b. But for fines and amerciaments in leets, the lord may either distrain and sell the distress, and then the distress is in nature of an execution, of the judgment of a court of record; or else he may impound the distress, and then it is replevisable.

Here it may not be improper barely to mention another sort of distress, which is the last and great process in courts of judicature, to bring the defendant into court, and oblige him to appear in civil cases, in actions as well real as personal.

This process is the attachment, which lies as well in inferior courts, not of record, as in superior courts; and it is given when the defendant has been summoned to appear and makes default. And it is not a process against the body of the defendant, but against his goods and chattels; for the officer attaches the defendant by his horse, his ox, or his cow. And where this process issues out of a court of record, there is no doubt but if the defendant makes default, the goods he was attached by are forfeited, because in such case there is a judgment of the king's court of record condemning the goods, which alters the property.

Dalt. Sher.
417.
Booth 3.
Dyer 199.
pl. 54.

And

And it seems that in the county court and court baron, which are not courts of record, if the defendant does not appear upon the attachment or distress, the goods by which he was attached or distrained, are likewise forfeited on his default. The reason why in this single instance the property is altered without the king's writ, or the judgment of a court of record, seems to be, for the more speedy administration of justice, which is of publick advantage; and the party by his appearance might have prevented the forfeiture.

Kitch. 155.
Dalt. 418.
Bro. tit. Court
Bar. pl. 1.

And here we may likewise observe, that where the plaintiff recovers in the county court, or court baron, the execution is only BY DISTRESS; that is, there issues a precept to the officer of the court to take the goods of the defendant, and keep them in pound, untill the defendant satisfy the plaintiff his debt. The reason is, because these are NOT courts of record; being held only in the lord's or sheriff's name; and therefore all the process run in their names and not in the king's, and without the king's writ no property can be altered. So that the execution in these inferior courts, only seizes and DETAINS the defendant's goods until he makes the plaintiff satisfaction for his debt. We find therefore in the register, the king's writ *de executione judicii* of these inferior judgments, and by virtue of that they may levy the plaintiff's debt as if he had recovered it in a court of record.

In the lord's court, if the defendant does not appear to do justice to the complainant on the summons, on the next process he ought to give pledges, or caution for his appearance; and therefore upon the attachment they may return him attached *per plegios*; and then if he don't appear his pledges shall be amerced; for which amerciamment the lord may have his action of debt. If the defendant cannot find pledges, the attachment is *per vadios*; and since the lord would have had the amerciamment if the defendant had been attached, by pledges, and had not appeared, therefore if he be attached *per vadios*, and do not appear, the *vadii* are forfeited; for the *vadii* come instead of the *plegii*, and therefore are hypothecated for his appearance in judgment of law. And by consequence, if he doth not appear to perform the condition of such pignoration, the *vadii* are forfeited; and therefore the defendant, where he is attached *per vadios*, may before the day of his appearance replevy the *vadios*, and put in pledges who are answerable for his appearance, and if he makes default are amerced.

But if there be a *levari facias* for a debt recovered in the lord's court, there the goods are not forfeited on the return; because after judgment he hath no day to appear; and therefore there can be no forfeiture arising to the lord nor the party: inasmuch as he was not bound by his fealty to do any such act to the party recovering, and consequently here the lord only seizes the chattels

chattels of his tenant to make him pay his debts. But the plaintiff must apply to the king's court to have the property altered by a writ *de executione judicii*, and so hath a compleat remedy for his demand.

But if the *vadii* were not to be forfeited on mesne process, the tenant would let such goods lie till at his leisure he could come in to contest the debt, which would tend to the delay of justice.

And here, note by the way, that the lord's distress for rent is in nature of a prerogative process, to take the goods and chattels of his debtor in the first instance without any summons; but at the next court day such distress is not forfeited to the lord, if not replevied; because then he would judge of forfeitures in his own cause.

But if the tenant was aggrieved he must apply to the king who is the lord paramount; and the complaint is, that he was distrained *contra vadios & plegios*; that is, when he was ready to give good security to contest the lord's debt;—and therefore the judgment in replevin is of return irreplevisable; that is, that the lord has a just cause to detain,—that such prerogative of the lord's should take place till the debt be satisfied.

3dly. A third case where a distress lies is, for toll in a fair or market.

Ro. Abr. 666.
Raym. 233.
Hob. 187.

And here the law is clear, that where a lord hath a fair or market by prescription, and hath used to take toll of cattle sold, if such toll be not paid, the lord may seize any of the cattle so sold, and retain them till satisfaction be made him for the toll. For the prescription is built on a grant of the KING, which by length of time is supposed to be worn out; and that grant was originally made for publick utility; fairs and markets being instituted for the more convenient supplying the subject with the necessaries and conveniencies of life. And therefore every subject that buys there, may very reasonably be charged for that conveniency with a moderate toll; and the lord hath the advantage of the toll, as a compensation for the mischief done to his soil by the beasts sold. And as the lord might have distrained the beasts for *damage feasant*, if he had not such fair, so he may distrain for the toll, which is in nature of a compensation for that damage.—Hence it should seem reasonable, that where the fair or market subsists meerly by grant from the crown,—as where the fair is newly created by grant,—and toll thereby given to the grantee, that he may distrain for such toll; for *qui sentit commodum sentire debet & onus*; and an action of debt would be no remedy. But THIS distress is only a pledge to be DETAINED till satisfaction made, and doth not seem to be within the statute to be sold.

Dr. & Stud. 4thly. If a township be amerced, and they
Dial. 2. cap 9. by consent assess a certain sum on every inhabitant

habitant for the raising thereof, and likewise agree that if it be not paid by such a day, that certain persons appointed for that purpose by the township shall distrain for the sum assessed on each inhabitant;—this is a lawful distress; because consented and submitted to by the agreement of those persons who are to pay the tax. It is the more reasonable, because the raising the tax in that manner is for the ease of the inhabitants; in regard the publick officer must otherwise levy and collect the amer-
ciaments.

5thly. A penalty inflicted for a breach of a by-law may be levied by distress; but this only in case where such remedy is APPOINTED for recovery thereof by the power that made the by-law, and at the time the by-law was made;—because the by-law only binds the members of that community who make the law, and therefore the assent of every member is presumed in the institution of that law; and consequently the penalty may be recovered by distress where the parties themselves have agreed to that remedy. But unless the distress be EXPRESSLY provided for by the corporation, the penalty can be recovered only by action of debt. The subject cannot be imprisoned for the breach of any by-law, though it be so expressly ordained by the power that made the by-law, because such imprisonments are against *magna charta*, and therefore the by-law appointing it is so far void, as being against the law of the land.

5 Co. 64. a.
Clarke's case.
Ro. abr. 366.
Dyer 321. pl.
23.

But where the corporation can prescribe in the distress, they may lawfully distrain for the penalty; because the prescriptive right is grounded on a by-law originally appointing that remedy for recovery of the penalty, and therefore is good; though the by-law on which it is grounded be by length of time worn out or lost.

Fleta 101.

Bro. tit. distr.

pl. 3.

6thly. A man may distrain beasts *damage feasant*. This, according to *Fleta*, is grounded on a particular custom of the realm. *Si dicere poterit captor*, says he, *quod iuste cepit averia quia invenit illa in terrâ suâ, & secundum consuetudinem regni imparcavit illa, donec damnum suum fuerit emandatum*. But from whence this notion was borrowed, or whenever it was introduced, it is highly reasonable that the owner of the land should defend himself from injury by driving out the beasts, and likewise by detaining the thing that did the injury, in a public pound, till compensation be made for the trespass; for otherwise he might never find the person whose beasts committed the trespass.

30 E. 3. 27. [A commoner may justify the taking of a STRANGER'S cattle, damage feasant, upon the common. And this was admitted in a late case, where the question upon an avowry for damage feasant, was "whether one commoner can distrain another commoner's cattle, with which he has overcharged the common beyond his stinted number of cattle;" and

4 Burr. 2426.

and in that case it was determined, that such a right to distrain turns upon this distinction—That wherever there is a colour of right for putting in the cattle, a commoner cannot distrain; because in such a case it would be judging for himself; and that in a question which depends upon a more competent inquiry, by assize, by a writ of admeasurement, or by an action on the case for surcharging the common. But where the cattle are put upon the common WITHOUT ANY COLOUR or pretence of right, there the commoner may distrain them; and upon that ground he may distrain the cattle of a stranger.

But if a man come to distrain, and see the beasts on his ground, and the owner chase them out before the distress be taken, though it be of purpose to prevent the distress, yet the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distress. Co. Lit. 161.
12 Mod. 661.

And if many cattle are doing damage, a man cannot take one of them, as a distress for the whole damage; but he may distrain one of them, for its own damage, and bring an action of trespass for the damage done by the rest.] 12 Mod. 660.

II. What things are distrainable.

The

Bro. tit. distr.
pl. 8.

The distress, as is already observed, was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the service, or perform the duty, for which it was taken; and therefore at common law could not be sold, but like all other pawns or pledges was to be restored to the owner when the service or duty was performed.

Rol. abr. 666.
(H.) pl. 4.
2 Bac. abr.
109.

The nature then of contracting by pawns or pledges being, that upon payment of the money for security whereof they were given, the pawn or pledge ought to be restored to the owner in the same plight and condition it was delivered; it follows, that MONEY cannot be distrained, except it be in a bag; for then the knowledge of the bag, especially if it be sealed sufficiently, secures the several pieces of money therein, so as the same individual pieces may be restored on redemption of the pledge.—

[So milk, fruit, &c. cannot be distrained.]

1 Jones 197.
Cooper v.
Pollard.
Ro. abr. 666,
667.
Sid. 440.

So sheaves of corn, at common law, could not be taken as pledges for rent; because all pledges were to be returned in the same plight and condition as they were in when taken; but these shed and scatter the grain by being removed, and consequently cannot be restored in the same condition upon the redemption. For the same reason, corn or hay, in a cock or barn, could

could not be distrained at the common law. Yet, at common law, corn or hay IN A CART might have been distrained, together with the cart itself; because then the pledge might have been removed without damage to the owner, and might likewise have been restored in the same condition it was in when taken, the whole being removed with the cart.—But this law was found inconvenient to landlords, and too great an encouragement to tenants to withhold their rent; and therefore it is provided by *Stat. 2 W. 3. c. 5.* that it shall be lawful for any, having arrear of rent, to seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary, or upon any hovel, stack or rick, or otherwise, upon any part of the land charged with such rent, and to lock up or detain the same in the place where it shall be found, in the nature of a distress, until the same shall be replevied, or fold.

[And by the 11 G. 2. c. 19. §. 8. The landlord may take and seize corn, grass, hops, roots, fruits, pulse, or other produce GROWING, as a distress; and the same may cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premises; and if there shall be no barn or proper place ON THE PREMISES, then in any other barn or proper place which he shall procure, SO NEAR AS MAY BE to the premises; the appraisement whereof shall be taken when cut, gathered, cured,

cured, and made, and not before; provided that notice of the place where such distress shall be lodged, shall, in one week after the lodging thereof, be given to the tenant, or left at the last place of his abode; and that if the tenant shall pay or tender the arrears of rent and costs of the distress, before the corn, &c. shall be cut, the distress shall cease, and the corn, &c. be delivered up.]

Co. Lit. 47.
Dyer 312.
2 Inst. 132.
565.

2dly. Tools and utensils of a man's trade cannot be distrained; because this would tend to the ruin of particular tenants, by taking away the very means of their support and preservation, and would consequently be of public inconvenience; and therefore the ax of a carpenter, the books of a scholar, and the like, are not distrainable, while any other distress can be had.—But lest this rule should be carried so far as to privilege the sheep of the tenant, and his beasts of the plough (they being the materials of husbandry, to plough and manure the land), and by that means the landlord be totally disappointed of the rents,—this matter hath been settled by the *Stat. de destructione scaccarii*; which enacts that no man shall be distrained by the beasts of his plough or his sheep, either by the king or any other, while there is another sufficient distress; unless for damage feasant, in which case the thing that does the trespass must make compensation.

[But

[But the rule of the common law which ^{3 Salk. 136,} exempts utensils, tools, instruments of husbandry, &c. from distress, hath been adjudged to hold only as to distresses for RENT ARREAR, AMERCIAMENTS, &c.—and not in cases where a distress is given in the nature of an execution, by any particular statute; as for POORS RATES, &c. The same doctrine hath been extended to *averia carucæ*, by a subsequent case, in ^{Hutchins & Chambers,} which one of the questions was “ whether *averia carucæ* may be taken as a ^{1 Bur. 579.} distress for the poors rate, where there are other distrainable goods sufficient.” —As to this it was decided, that a seizure under the 43 of Eliz. and such like acts of parliament, is but partly analogous to the common law distress, as being replevisable, &c. but is much more analogous to the common law execution by *feri facias*, where the surplus after sale shall be returned. And though it was admitted, that in the old common law distresses, which were in nature of a *nomine pænæ* to compel payment, it would have been absurd to suffer the implements, by which a man gained his livelihood, to be holden as a pledge, because that would have been taking from him the only means he had of being able to discharge the debt; yet it was determined, that this reason does not hold, where the things distrained may be immediately sold by way of satisfaction; which though called a distress, yet really is, in this respect, AN EXECUTION; and
in

in cases of execution, *averia caruca* may be distrained, although there be other sufficient distresses. On this ground therefore, the court were unanimously of opinion, that there was no objection to the distress from the *averia caruca* being taken: inasmuch as they were distrainable under the 43 of Eliz. and such like acts of parliament.]

Co. Lit. 47.

Salk. 249.

3 Bur. 1502.

3dly. Things sent to publick places of trade, as cloth in a taylor's shop, yarn in a weaver's, a horse in a smith's, and the like, are not distrainable; for it is of publick utility that the shops of traders should be privileged from the lord's distress for his rent; for otherwise no man could supply himself with the necessaries of life, without the danger of losing them for another's debt, and therefore the landlord cannot distrain these things for the rent of the shop.

Ld. Raym.

386.

[But it has been adjudged, that there is no such restriction, where the distress is for a personal duty, as for toll.

Palmer 367.

374.

Rex v. Col-

lins, & others.

2 Rol. Rep.

345. S. C.

3 Bull. 269.

So the cattle and goods of a guest are not distrainable at an inn; for an inn is *publici juris*; and every man has a right to put up at it. Indeed, it has formerly been questioned, whether a man could erect an inn at his own pleasure: at least, it appears that common inns are so much devoted to the public service, that their owners are obliged to receive all guests and horses that come

come to them for reception. And the privilege which exempts cattle and goods from being distrained at an inn arises from this circumstance, that they are there by authority of law.

Co. Lit. 47.
a. Bro. abr.
tit. distress,
pl. 56. Rol.
abr. 668.
pl. 12.

In a modern case, the question was, ^{3 Bur. 1498.} “whether a gentleman’s chariot, which stood in a coach-house belonging to a common LIVERY STABLE keeper, was distrainable for rent due to the landlord from the livery stable keeper, for this coach-house, which (together with the stables, &c.) he rented of the landlord, who distrained it.” For the plaintiff, it was argued that the chariot was not distrainable, under a supposed analogy between a livery stable and a common public inn; and from the principle of general utility and convenience to the community. On the other hand, it was insisted for the defendant that a livery stable keeper differs widely from an innkeeper; inasmuch as the former is not liable to the same inconveniencies as the latter, and therefore ought not to enjoy the same privileges; and that if a livery stable keeper has no such privilege himself, it must of course follow that none can be claimed under him. As to the principle of utility and convenience, it was urged, that there was no necessity for a gentleman to set up his chariot at a livery stable: and that the inconvenience would be much greater on the side of the landlord, if he should be debarred of his legal right, to distrain goods found upon his premises, for rent
in

in arrear, than any that could arise from allowing him this established security for his rent, in the case of a person who appears to be no more than an ordinary under-tenant, and without any reasonable pretence of exemption from the general law of distresses. Lord Mansfield and the other judges present, saw this question in such a light, with regard to the consequences of it, and the inconvenience that might attend it, even to the landlords, owners and keepers of livery stables, as well as to gentlemen who used them, (in case this distress should be solemnly adjudged a good one,) that they intimated to the avowant, who happened to be personally present, that it might be well worth his while to consider, whether it would be for his own interest to wish "that judgment should be formally pronounced for him." Accordingly, there was no judgment given. But (adds the reporter) it seems extremely clear, "that the chariot was liable to the distress, and that there was not a shadow of legal claim for an exemption."]

Cro. Eliz.
549. 596.
Read v. Bur-
ley.

J. S. a clothier put wool to B. a spinner to spin, and afterwards J. S. comes with a horse to bring back the yarn; but B. having no weights in his own house to weigh it, J. S. took his horse and went with B. to the house of C. to get the yarn weighed; and C.'s landlord, while the yarn was weighing came and distrained the yarn and the horse of J. S. for C.'s rent. But the distress

strefs was held unlawful, because if the yarn had been weighed either in *B.*'s house, or in a publick weigh-house, it had been unquestionably privileged, for the encouragement of trade. So in this case the design of bringing the horse and yarn into the house of *C.* being only in the way of trade, that design secures them from a distress in the house of *C.*—as much as if they were in a publick weigh-house.—As a horse that brings corn to a market, and is put into a private yard while the corn is selling, cannot be distrained; because the bringing of the horse there is in the way of trade, and consequently public benefit.

4thly. If a stranger's beasts be upon the lord's land, by escape or otherwise, though they be not *levant* and *couchant*, the lord may distrain them, not only for rent, but for the accidental services of heriots, amerciements in leets, &c.

10 H. 7. 21,
b.
Co. Lit. 47. b.
Dr. & St. c. 7.
p. 15. *contra.*

This rule was observed in the civil law, in the *prædiis urbanis*, but not in *prædiis rusticis*.—But when the forfeiture of the feud, which originally accrued to the lord by not answering the services, was changed into a distress, this was thought a mild alteration; and the distress was the rather extended by our law to stranger's cattle for the recovery of the services, to prevent any trick in the tenant, who might otherwise disappoint the lord of his remedy, by grazing and stocking the land with other men's cattle. And if the stranger suffers, it is

D

through

through his own default, in suffering his cattle to trespass on another's soil.

2 Saund. 289.

And this rule hath been carried so far, that if a freeholder be bound to repair his neighbour's fences, and lets the land, and the lessee suffers the fences to decay, whereby his neighbour's beasts enter and come upon his lands, yet the freeholder may distrain these beasts, thus escaped, for rent. But the reporter observes, that this case is hard to be maintained; for though it be reasonable that the lord of an antient seignory, who is no way concerned in the fence, should distrain beasts thus escaping; yet it is not therefore just that a lessor, who is obliged to see the fences kept, should be suffered to take advantage of his own wrong.

Ld. Raym.
168.

[The same distinction was taken and admitted in a subsequent case. And it seems to be now settled, that where beasts escape, and come upon land, by the negligence or default of their owner, and are trespassers there, they may be distrained immediately by the landlord for rent arrear. But where they come upon the land, by the insufficiency of fences, which the tenant, being a lessee, ought to repair, the lessor cannot distrain such beasts, till ACTUAL NOTICE has been given to the owner that they are there, and he has afterwards neglected to remove them. In the case of an ancient seignory however the lord may distrain the beasts of a stranger, which have escaped by default of the tenant, in not repairing his fences; and that (as it should seem) before they are *levant and couchant*, though the books differ in that particular;

Lutw. 1580.

Ld. Raym.
169.

Lutw. 1580.
2 Rol. Rep.
124.

particular; because the lord hath nothing to do with repairing the fences, and he hath no remedy but by distress. But the owner may prevent the distress, by making fresh pursuit; for then the cattle remain, as it were, in his own possession. Ld. Raym. 168.

If beasts are turned in upon land by consent of the owner, they are immediately distrainable for the landlord's rent;] and therefore it hath been held, that where a stranger puts in his beasts to graze for a night, by the consent of the lessor, and licence of the lessee, yet the lessor may distrain them for rent due out of those lands which he consented the beasts should graze on; because the consent for putting in the beasts was not a waiver of his right to distrain, unless it had been expressly agreed so: for being but a parol agreement it could not alter the original contract between the lessor and lessee, from which the power of distraining arises. Cro. El. 549.
Fowkes, v. Joyce.
3 Lev. 260.
2. Ventr. 50.
S. C.
2 Lutw. 1161.
S. C.

But as in that case the beasts were going to the London market, and only grazed one night on the land in their way thither, it was disputed, whether their being on the road to market should privilege them from the distress; and it was resolved it should not; because then such privilege must extend through the whole kingdom, which would lay too great a restraint on landlords; and the privilege of trade is local, and only relates to the place where the market is kept; therefore the safest way is to drive cattle to a public inn, and then (as is said before) they are privileged from distresses.

[However, in the foregoing case of Fowkes and Joyce, the owner of the cattle was afterwards relieved in equity, on the ground of fraud and contrivance in Joyce, the lessor, to subject the cattle to his distress. And the court of Chancery seemed to think that the grounds used with an inn, ought to have the same privilege, as the inn itself; and therefore that the cattle of strangers or passengers, ought not to be there distrained. 2 Vern. 129. Prec. Chan. 7.]

In a case also where a rent-charge had been in arrear for twenty years, and cattle, escaping out of the adjoining grounds, had been distrained for the arrears, the distress was relieved against in equity. Broden and Pierce, 2 Vern. 131.]

2 Leon. 7, 8. For a rent-charge the grantee cannot distrain a stranger's beasts until they are *levant and couchant*. For this rent doth not stand upon a feudal title, as the rent-service, but it is said to be against common right; and therefore the stranger's beasts must be so long resident on the lands, out of which the rent-charge issues, that notice may be presumed to the owner of them; that is, they must be lying down and rising up on the premises FOR A NIGHT AND A DAY, without pursuit made by the owner of them.

Bro. tit. Distr.
pl. 40.

And it seems the sheriff may distrain the beasts of a stranger on my land, for the issues forfeited by me in the king's courts for non-appearance; for the issues forfeited by my default create a debt to the king, which is to be levied on my land;—

Bro. tit. Distr.
pl. 3.

and

and the obligation on me to appear on the summons in the king's courts, arises from my being proprietor of such land, and I am summoned to appear, on the penalty of forfeiting so much of the issues of that land; which creates the obligation on me; and therefore whatever is found on that land shall be answerable for the issues forfeited by me.

5thly. Whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; consequently that cannot be a pledge which cannot be restored *in statu quo* to the owner. Co Lit. 7.b.

Besides, what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the *inducta* and *illata* upon the soil or house. Hence it is that doors, windows, furnaces, &c. affixed to the freehold, are not distrainable.

So a millstone is not distrainable though it be removed out of its proper place in order to be picked; because such removal is OF NECESSITY, and the stone still continues part of the mill. So it is of a smith's anvil on which he works; for this is accounted part of the forge, though it be not actually fixed by nails to the shop. B.c. tit. Distr. pl. 23.

6thly. What is in the hands and actual occupation of another cannot be distrained; for that cannot be a pledge to me which another has the actual use of; consequently the distress, which follows the nature of a pledge, cannot be of those things which cannot be reduced into the ACTUAL possession. Co Lit. 47. a. Ro. Abr. 667. Sid. 440.

sion of the person distraining; therefore the ax in a carpenter's hand, or the horse on which I am riding, cannot be distrained; [for rent] for they are for that time privileged by law.

7thly. Goods in the custody of the law are not distrainable; for it is *ex vi termini* repugnant, that it should be lawful to take goods out of the custody of the law.—And that cannot be a pledge to me which I cannot bring into my actual possession. Hence it is that goods distrained for *damage feasant* cannot be taken for rent; nor goods in a bailiff's hands on an execution; nor goods seized by process at the suit of the king; nor will a replevin lie of them.

3 H. 7. 1.

But if a replevin come after goods are sold on the execution, the defendant must claim property, for then they are out of the custody of the law in the hands of a private person.

Co. Lit. 47.

[And lastly, as every thing which is distrained, is presumed to be the property of the wrong doer, it follows that such things wherein no man can have an absolute and valuable property, as dogs, cats, rabbits, and all animals *feræ naturæ*, cannot be distrained. Yet if deer, which are *feræ naturæ*, are kept in a PRIVATE inclosure for the purpose of SALE OR PROFIT, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent.]

Davis v.
Powell, C. B.
Hil. 11 G. 2.

When we speak of chattels not distrainable, it must be understood of chattels not distrainable FOR RENT; for all chattels whatever are distrainable *damage feasant*: it being but natural justice that whatever doth the

the injury should be a pledge to make compensation for it.—Therefore all chattles are liable to make satisfaction for the trespass by them committed; hence it is that the tools and utensils of a man's trade, stacks of corn, and the horse on which a man rides, are distrainable *damage feasant*; nay the horse may be led to the pound with the rider on him. Co. Lit. 47.
Sid. 440.

[III. of the time, place, and manner of making the distress.]

1. A man cannot distrain for rent in the night [which, according to the author of the Mirror, is after sunset and before sunrise;] because the tenant hath not thereby notice to make a tender of his rent, which possibly he might do, to prevent the impounding of his cattle. Dr. & St. 15.
Co. Lit. 142. a.
Mir. c. 2. f. 6.
2 Inst. 10, 7.

But a man may distrain in the night beasts *damage feasant*; because the beasts might escape before morning, or before he could take them; and then he would have no remedy for the injury.

[The distress for rent, must be for rent in arrear; therefore it may not be made the same day on which the rent becomes due; for if the rent be paid at any time during that day, whilst a man can see to count it, the payment is good. And it must not be after tender of payment; for if the landlord come to distrain the goods of his tenant for rent, the tenant may, before the distress, tender the arrearages; and if the distress be afterwards taken, it is illegal. So if the landlord have distrained, and the tenant make a tender of the arrearages be- 2 Inst. 107.

fore the impounding of the distress, the landlord ought to deliver up the distress; and if he does not, the detainer is unlawful.

At common law, the landlord must have distrained for rent in arrear, during the continuance of the lease; but now by the statute of 8 Ann, c. 14 §. 6, 7. it is enacted, that it shall be lawful to distrain after the determination of the lease, in the same manner as if it had not been determined: provided that the distress be made within six kalendar months after the determination of the lease, and during the continuance of the landlord's title or interest; and during the possession of the tenant.]

2 Inst. 131.
M r. c. 2. f.
26.

2. No private person can distrain 'beasts off his own land, or on the high road;—so is the statute of *Marlbridge*, c. 15. *Nulli liceat ex quacunque causâ distractiones facere extra feodum suum, nec in regiâ viâ, aut communi stratâ, nisi domino regi, &c.* for the high road is privileged for the convenience and encouragement of commerce.

[Yet this shall not be taken to make the distress illegal, so as to give an advantage thereof in bar of the avowry—but to this purpose only, that if the lord distrain in the highway, the tenant may have an action against him upon this statute. 2 Inst. 131.—As to the king's power of distress on any lands of the tenant, though not holden of the king, the reader may consult, 5 Co. 4, 56. 1 Rol. abr. 670. 2 Rol. abr. 159. 2 Inst. 132. 4 Inst. 119. Lane 39.]

And though chattels or pledges on the land only, are to answer the lord's rent; yet
if

if the lord comes to distrain, and the tenant seeing him drives the cattle off the land, the lord may follow the beasts and distrain out of his fee, if he had once a view of his cattle on his land. But if the beasts go off the land of themselves before the lord observe them, he cannot distrain them afterwards, as he might where the tenant drives them off: for the tenant by his own wrong cannot prevent the lord of his right.

[In trespass for taking goods, the defendant justified, that he demised some tenements to the plaintiff for one term, and others for another term; and that rent being in arrear on both demises, he distrained the goods. On demurrer the distress was held ill; for these being separate demises, there ought to have been separate distresses, on the several premises subject to the distinct rents: and no distress on one part can be good for both rents. For these reasons, therefore, the plaintiff had judgment. Str. 1040.

But where lands, lying in different counties, are held under one demise, at one entire rent; in such case, a distress may be lawfully taken in either county, for the whole rent in arrear. Ld. Raym. 55.

And now, (by 11 G. 2. c. 19.) if any tenant for life, — years, at will, sufferance, or otherwise, shall fraudulently, or clandestinely convey his goods off the premises, to prevent his landlord from distraining the same; such person, or any person by him lawfully empowered, may in thirty days next, after such conveyance, seize the same, wherever they shall be found, and dispose
of

THE LAW OF DISTRESSES.

of them in such manner as if they had been distrained on the premises.—But (by §. 2. of the same statute) the landlord shall not distrain any goods, which shall have been previously sold, *bona fide*, and for a valuable consideration, to any person not privy to such fraud.

And by the same statute, (§. 3.) every tenant who shall so convey away his goods, and every person who shall knowingly aid or assist him therein, or in concealing the same, shall forfeit to the landlord, double the value of such goods.

By the same statute, the landlord may distrain any cattle or stock of the tenant, depasturing on any common belonging to the demised premises.

3. At common law, no person was allowed to break open or throw down any gates or in inclosures, to make a distress; for that would have amounted to a disseisin. Co. Lit. 161. And the lessor could not, in any case, have entered into the house, nor even into the barn of his tenant, for the purpose of making a distress, unless the outer door had been open. Bac. abr. 2 v. p. 111. But when he was in the house, it was held that he might break open an inner door. Comb. 17. So he might have taken the distress out at a window. Bac. abr. *ib*.

And now by statute, (11 G. 2. c. 19. §. 7.) where any goods or chattels, fraudulently, or clandestinely conveyed off the premises, to prevent the landlord from distraining them for rent, shall be put placed or kept in any house, barn, stable, outhouse, yard, close,

close, or place, locked up, fastened, or otherwise secured; it shall be lawful for the landlord, his steward, bailiff, receiver, or other person or persons impowered for that purpose, to take and seize, as a distress for rent such goods and chattels, (first calling to his assistance, the constable, headborough, borsholder, or other peace officer of the hundred, district or place, where the same shall be suspected to be concealed; and in case of a dwelling house, oath being also first made, before a justice of the peace, of a reasonable ground to suspect that such goods or chattels are therein,) in the day time, to break open, and enter into such house, barn, stable, outhouse, yard, close and place; and to take and seize such goods and chattels for the arrears of rent, as he might have done if they had been in any open place.

If a landlord comes into a house and seizes upon some goods as a distress in the name of all the goods in the house, it is a good seizure of the whole. 6 Mod. 215.]

Distresses ought not to be excessive; but in proportion to the duty distrained for.—

This is provided by the statute of *Marlbridge, c. 4.* *Distractiones insuper sint rationabiles & non nimium graves; & qui distractiones fecerint irrationabiles graviter amercientur.* 2 Inst. 106, 107.

Thus if the lord distrain two or three oxen for 12 *d.*—this is unreasonable; so if he distrain a horse or an ox for a small sum, where a sheep or a swine may be had, this is an excessive distress, because he might have taken a beast of less value.—But if there
be

be no other distress on the land, then the taking of one entire thing, though of never so great value, is not unreasonable.

4 Co. 8, 66.

Ro. Abr. 674.

Bro. abr. tit.

Affise 291.

Prerogative,

98.

No distress for *homage, fealty*, or for the expences of knights in parliament can be excessive, because these are services of such absolute necessity to the publick, that men cannot be under too great an obligation to perform them.

[Before the statute of the 17 Car. 2. c. 7. in case a distress was too little, where sufficient distress was to be had, a man could not distrain again, were the demand ever so great; because it was his folly that he did not distrain sufficient in the first instance. Moore 7. Comb. 546.]

But now, by that statute, "in all cases where the value of the cattle distrained shall not be found to be to the full value of the arrears distrained for; the party to whom such arrears were due, his executors or administrators, may distrain again for the residue of the arrears."

So where the distress is made by virtue of the warrant of a justice of the peace, in nature of an execution. As, in the case of Hutchins and Chambers, where one of the questions was, "whether a second distress could be at all justified, when there was enough, which might have been taken upon the first, if the distrainer had then thought proper."

It was resolved, that a man who has an entire duty shall not split the entire sum; and distrain for one part of it at one time, and for other part of it at another time; and so *toties quoties*, for several times: for

that is great oppression. And so is the case of Wallis v. Savil in 2 Lutw. 1532. Where the second distress was holden unjustifiable; because both distresses were taken for one and the SAME rent, and it was the lessor's folly, that he had not taken a sufficient distress at first.

But if a man SEIZES for the whole sum that is due to him and only MISTAKES the value of the goods seized; which may be of very uncertain or even imaginary value, as pictures, jewels, racehorses, &c. there is no reason why he should not afterwards complete his execution by making a further seizure. And how can the officer who seizes judge of the real, or perhaps imaginary, value of the horses or goods seized? The value of them may be quite unknown to him, or may even depend upon whim and fancy.

It is to the advantage of the owner of the goods that this should be so. It is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time: or else, it might induce him to a necessity of taking effects of a very great value, at first. For if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at the first.

Now pictures, horses, jewels, books, and some other such effects, may be of so uncertain, and even imaginary, or fancied value, that it may be exceedingly uncertain how much money they may fetch when they come to be sold: so that the person seizing
may

may not be at all able to judge, HOW MUCH they may produce upon sale.

And if he does not take the value of the whole at first, out of tenderness and moderation, perhaps, there is no reason why he should not complete it by a second seizure; provided it be for the same sum due. 3 Bur. 589.—The latter part of this reasoning should seem to extend only to a SEIZURE under an execution.

Another question in the case of Hutchins and Chambers was,—“whether the SECOND “distress, being EXCESSIVE, was a sufficient “ground for an action of TRESPASS.”—Several authorities were cited to shew that an action of trespass will not lie for taking an EXCESSIVE distress; but that it ought to be a particular action grounded upon the statute; and particularly one case in 2 Stra. 851. *Lynne v. Moody*, in which it was said that the remedy ought to be a special action founded on the statute of Marlebridge.

“So that it was sufficiently established “that a general action of trespass cannot “be maintained for taking an excessive “distress.”

One case was cited to the contrary, which was the case of *Moir v. Munday*, H. 28. G. 2. B. R. and that was an action of trespass; where six ounces of gold, and one hundred ounces of silver, were taken for 6*s.* 8*d.* which was holden to be an EXCESSIVE distress, and there judgment was given for the plaintiff.

But that appeared upon the face of it, and upon the pleadings to be excessive: and so the court expressly declared. And

it

it was a distress of gold and silver, which are of a certain known value, and even the measure of the value of other things. But it was there holden, "that in all OTHER cases of goods or OTHER things of arbitrary and uncertain value, it MUST be an action upon the statute." And this was the distinction there taken. And that is therefore an exception and was there considered as being so from the general rule; and serves to confirm the rule itself. The court were therefore of opinion, that there was no cause of action maintainable in the present case, it being an action of TRESSPASS. 1 Bur. 590.

But if any distress and sale be made, as for rent in arrear and due, when in truth not any is due, in such case the owner may recover double the value, with full costs. 2 W. sess. 1. c. 5.

And if the distress be made without cause, the owner may make rescous; yet, if in such case it be impounded, the owner cannot break the pound and retake it, because, then it is in the custody of the law. 1 Inst. 47.]

At common law, no man was obliged to give notice of his having taken a distress; because the tenant must have known the arrears that were due; and therefore at his peril must have taken care to pay them;—it was his own default that subjected the land to the lord's distress. Besides the law has appointed a publick pound for keeping the distress, where the tenant by resorting may have notice. Ro. Abr. 674.

[But

[But quære, whether not icemust not be given of dead chattels, which must be kept in a private pound?

It seems that, at common law, where the distress was impounded in a common pound overt, the owner must have taken notice of it at his peril; but if it were impounded in a special pound overt, so constituted for that particular purpose; or in a pound covert; the distrainer must have given notice of it to the owner. But the common law, as to giving notice in cases of distress for rent, is now altered by a statute which will be mentioned hereafter.]

IV. How the distress is to be used, [and disposed of.]

Spe'm. 447.

First, we shall consider where the distress, which is but a pledge, is to be kept;—and that is in the pound.—This is described by *Spelman* in these words.—*Parcus est stabulum, vel area angustior repagulis firmiter conclusa, quâ nociva in frugibus prædiisq; pecora tanquam in carcere coercentur.*—*Parci autem usum a continente traduxisse Saxones nostros hinc intelligas, quod in ripuariorum legibus jam olim utpote ante 800 vel 900 annos reperitur. Si quis peculium alienum, in messe adprehensum, ad parcum minare non permiserit, 15 sol culpabilis judicetur.*

Tit. 82. f. 2.

Gall. mener.

Co.Lit. 47. b.

The pound then being nothing more than a publick prison for goods and chattels, is either *overt* or *covert*. All living chattels distrained, are regularly to be put in the pound *overt*, because the owner at his peril is to sustain them, and therefore they ought to be put in such an open place
as

as that he may have resort to them for that purpose.

At common law a man might have im- 2 Inst. 106.
pounded his distress in what county he pleased; but this was found very inconvenient to the owner, who was thereby at a loss where to find his beasts, either to feed or replevy them. This mischief was therefore provided against by the statute of *Marlbridge*, c. 4. "*nullus de cetero faciat ducere distractiones quas fecerit, extra comitatum in quo captæ fuerint.*"

Yet upon this statute it hath been held, Ibid.
that where the tenancy is in one county and the manor in another, the lord may drive the distress to the manor pound though it be out of the county where the distress was taken;—because the tenant by attending the manor court is presumed to know every thing transacted in the manor; and therefore this case is out of the mischief provided against by that law.

But now by the statute of 1 & 2 Ph.
& M. c. 12. no distress of cattle is to be driven out of the hundred, &c. where the same is taken, except it be to a pound *overt* within the same shire, not above three miles from the place where the same is taken; nor impounded in several places, whereby the owner may be constrained to sue several replevins; on pain to forfeit to the party aggrieved, 100 shillings and treble damages.

[And by the same statute (§. 2.) no person shall take for keeping in pound, or impounding any distress, above four-pence for any one whole distress: and where less hath

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been

been used, there to take less; on pain of forfeiting 5*l.* to the party grieved, besides what he shall take above four-pence.

2 Str. 1272.

3 Lev 48.

The defendant justified impounding cattle *damage feasant*; and in evidence it appeared that he put them into the next pound, though it happened to be in another county. And Lee Ch. J. held that it did not make him a trespasser, though it subjected him to the penalty in the statute of 1 & 2 Ph. & M. c. 12.

Ld. Raym. 55.

And in another case, where lands, lying in two adjoining counties, were held under one demise, at one entire rent, and the landlord distrained cattle in both counties for rent arrear, it was holden that he might chase them all into one county; though if the counties had not adjoined, it would have been otherwise.]

Co. Lit. 47. b.

Ro. Abr. 673.

Dead chattels, as household goods, &c. which may receive damage by the weather, must be put into a pound *covert*;—otherwise the distrainer is answerable for them if they be damaged, or stolen away; and this pound *covert* must be within three miles in the same county.

But beasts, as is said, ought to be put in a publick pound; for if they be placed in a private pound the distrainer must keep them at his peril with provision, for which he shall have no satisfaction; and if they die for want of sustenance, the distrainer shall answer for them.

[Now 11 G. 2. c. 19. §. 10. any person distraining, may impound, or otherwise secure the distress, of what kind soever it be, in such place or on such part of the premises,

as shall be most convenient; and may appraise and sell the same, as any person before might have done off the premises.]

But the distrainer cannot work or use the thing distrained, whether it lie in a pound 2 Bac. abr. 112. *overt* or *covert*; because the distrainer has only the custody of the thing as a pledge, and therefore is not to make use of it; but the owner may make profit of it at his pleasure.

[But there is an exception to this Cro. Jac. 148. general rule in the case of milch kine, which may be milked by the distrainer; because it may be necessary to their preservation, and consequently of benefit to the owner.]

The distrainer cannot tie or bind a beast in the pound, though it be to prevent its escape; for Ro. abr. 673. Ld Raym. 720. 1 Salk. 428. BEASTS IN POUND ARE IN CUSTODY OF THE LAW, which intends the preservation of the pledge; and therefore the distrainer at his peril must do no act that tends to the hurt or destruction of them.

[But if cattle distrained die in the pound, Ld. Raym. 720. Salk. 248. S. C. without any fault in the distrainer; in such case, he who made the distress shall have an action of trespass; or may distrain again, if the distress was for rent.]

If a distress be taken without cause, a stranger cannot rescue them from being driven to pound; but the owner may make rescue Ld. Raym: 105. BEFORE THEY ARE IMPOUNDED. But after the beasts are impounded, the owner himself cannot rescue them, unless he find the pound unlocked, for he cannot break it open. The reason is, that the naked

possession is a title against any person but the owner; but the owner has a title, and therefore may take the beasts at any time, though cannot break the pound which the law hath ordained.

Mir. c. 2. f.
36.

[By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth against the peace, and doth a trespass to the king, and to the lord of the fee, and to the sheriffs, and hundreds, in breach of the peace, and to the party, and in delay of justice; and therefore hue and cry is to be levied against him as against those who break the peace. And the party who distrained may take the goods again, wheresoever he shall find them, and impound them again.

Co. Lit. 47.

2 W. & M. c.
5. f. 4.

And now by statute, on any pound breach, or rescous of goods distrained for rent, the person grieved thereby shall, in a special action UPON THE CASE, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession.

Co. Lit. 161.

When a man hath taken a distress, and the cattle distrained, as he is driving them to the pound, go into the house of the owner; if he that took the distress demand them of the owner, and he deliver them not, this is A RESCOUS in law.

2. Distresses for rent being in the nature of pledges, the distrainer had no power to sell them, at the common law. But now by statute, (2. W. & M. sess. 1. c. 5.) it is enacted, that where any goods shall be
distrained

distraigned for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods distraigned, shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or under sheriff of the county, or with the constable of the hundred, parish or place, where such distress shall be taken, cause the goods so distraigned to be appraised by two sworn appraisers (whom such sheriff, under sheriff, or constable shall swear to appraise the same truly, according to the best of their understandings;) and AFTER SUCH APPRAISEMENT, shall SELL the same for the best price that can be gotten for them, for satisfaction of the rent, and charges of the distress, appraisement and sale; leaving the overplus (if any) with the sheriff, under sheriff, or constable, for the owner's use."

In an action of trespass, for entering Str. 717. the plaintiff's house, and keeping possession of it for eight days, the defendant justified under a distress for rent. But by the court, the defendant ought to have removed the goods at the five days end; and for the other three he is a trespasser, and there is no justification.

But quære, as to the time of removing the distress; for the tenant is to have five days to make replevin; and as those must be whole days, exclusive of the day of taking the distress, it follows that the di-

strainer cannot remove the distress till the seventh day.

Ld. Raym.
54.

In an action of trover brought for cattle which had been distrained for rent, it was found that the plaintiff was owner of the cattle, and that the defendant, after taking the distress, gave notice to the plaintiff, according to the statute of 2 W. & M. sess. 1. c. 5. And it was objected that the notice was ill; for the act says, that it should be at the chief mansion-house, or other notorious place upon the premises; but in this case, it was given to the plaintiff himself. *Sed non allocatur*; for by the court, the intent of the act was only, that the party should have notice, which is performed by this mean, better than if it had been left at the house or other place. It was also objected to the notice, that, according to the finding of the jury, it was given to the owner of the cattle, and not to the tenant of the land. And that although the act is in the disjunctive, yet it ought to have a reasonable construction; and it is most reasonable, that the notice should be given to the tenant of the land, because he may shew that the rent is satisfied, which does not lie in the knowledge of the owner of the cattle. *Sed non allocatur*; for the act has expressly provided, that notice may be given to the owner of the goods. But if the tenant had sued a replevin, then the notice must have been given to him; but notice to the owner sufficiently affects the owner; and the plaintiff is found owner of the cattle, therefore notice to him is sufficient.

In

In the same case it appeared, that the tenement, whereupon the distress was made, lay part in the hundred of Kinasley in Wiltshire, and part in the hundred of Andover in the county of Southampton; that part of the distress was taken in Kinasley, and part in Andover; but that all was impounded together in the hundred of Kinasley; and that the constable of Kinasley administered the oath to the appraisers for the whole in the presence of the constable of Andover. It was objected, that the goods which were taken in Andover, ought to have been appraised and sold there, and that the constable of Andover, though present in Kinasley when the appraisement was made, had no jurisdiction there; so that the whole was done solely by the constable of Kinasley, which therefore, as to the goods taken in Andover, was void. But by the court, as the distress was taken for ONE INTIRE rent, the distrainer might well impound the whole of it in Kinasley; and the chasing of the cattle, taken in Andover, to the pound in Kinasley, was but a continuance of the taking: therefore, the constable of Kinasley was the proper officer, within the act, to superintend and administer the oath for the appraisement of the whole distress.

As to the mode of selling a distress under warrant from a justice of the peace, it is enacted, by the 27 Geo. 2. c. 27. that the justice, granting the warrant of distress, shall therein order and direct, that the goods distrained shall be sold, within a certain limited time not being less than four, nor

more than eight days; unless the penalty or sum of money distrained for, with the reasonable charges of the distress, be sooner paid. And after such sale, the overplus (if any) is to be returned on demand to the owner of the goods distrained.

At common law, the many particulars which attended the taking of a distress, rendered it a hazardous mode of proceeding; for, if any one irregularity was committed, it vitiated the whole distress, and made the distrainer a trespasser *ab initio*.

11 G. 2. c. 19.
s. 19.

But now it is provided, by statute, that where any distress shall be made for any kind of rent JUSTLY due, and any irregularity shall be afterwards done by the party distraining or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *AB INITIO*; but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case at his election. But no tenant shall recover in such action, if tender of amends hath been made before the action brought. And the defendant in such action may plead the general issue, and give the special matter in evidence.

Ib. s. 20.

Ib. s. 21.

2 W. & M. sess.
1. c. 5. s. 5.

But though the tenant shall only make satisfaction for the real damage sustained, by any irregularity in taking or disposing of the distress; yet if any distress and sale shall be made, for rent pretended to be due to the person distraining, where in truth no such rent is due, the tenant shall recover double the value of the goods distrained, together with full costs of suit.]

C H A P. II.

O F T H E

R E P L E V I N.

HAVING in the foregoing chapter shewn in what cases a distress or pledge may be taken, and how it is to be disposed of; the next thing, in order, to be treated of is, THE REMEDY given the party to controvert the legality of such caption, in order to bring back the pledge to the proprietor, in case the distress were unlawfully taken, and without just cause. This being a writ of great use, and of every day's practice, deserves a very full consideration.

Spelman in his glossary describes it thus: Spel. Gloss. replegiare est rem apud alium detentam, cautione legitimâ interpositâ, redimere—et hæc cautio est stipulatio in formâ juris adhibita, de stando juri et sistendo se foro; dictum autem replegiare quasi revadiare, hoc est vadium vel pignus unum, loco alterius, suggerere & constituere.

Or,

THE LAW OF REPLEVINS.

Or, in other words, a replevin is a judicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels; commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels.

Under this head is to be considered;

I. How the replevin stood at common law, and the alterations which have been made therein by statutes.

II. Of the duty of the sheriff in the execution of the replevin; and herein of the pledges.

III. Of the process to make the defendant appear.

IV. Of the process where the goods are eloigned; and herein of the writ of *withernam*.

V. Of the process and proceeding where the defendant claims property.

VI. Of the process, as well for the plaintiff as defendant, in removing the replevin from the inferior courts.

VII. Of the replevin itself; and herein are to be considered,

1. For whom and in what cases it lies,
2. The declaration in replevin.
3. The several pleas in this action.
4. The judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and the writ of second deliverance.

VIII. Of the writ of recaption.

I. Of the replevin as it stood at common law. Here it is first to be observed,

ed, that the replevin was at common law 2 Inst. 140. R:g. 81. a. a justicial writ, that is, gave the sheriff a justicial power to determine the point complained of in the county, whereas other writs gave him only a ministerial power. This justicial power is taken from these words in the writ: *Et eum juste deduci facias*—by which the sheriff is made judge, whether the taking be just or not. This was highly reasonable, in order that this remedy might be speedy, lest the party should want his beasts for carrying on of his husbandry; and therefore not to have formed this writ justicial, would have been not only detrimental to private persons, but injurious to the commonwealth. Hence it is called *festinum remedium*. Besides, it would have been of great trouble and expence to private persons to have taken the determination of these sort of complaints, which must have happened every day, out of the neighbourhood. And yet the manor court was not trusted with this power in any cause between lord and tenant, because the lord was not to be judge in his own cause.

2dly. It is to be observed that there are two things complained of in this writ, *viz.* The taking and detention of the pledges, as the words of the writ express it—*quæ cepit & injuste detinet*.—But what is principally controverted in the replevin, is, whether the taking be just or not. For there are but two cases wherein a distress justly taken, whether for rent or *damage feasant*, can be unlawfully detained. The first is where the arrear of rent, or amends for
Dr. & Stud. c. 27.
 2 Inst. 107.
 5 Co. 76 a.
 8 Co 146. b.
 Cio. Eliz. 813.
 the 1 Brownl. 173.

the damage, is tendered to the party distraining. — And this tender must be made before the beasts are impounded; for when the beasts are in custody of the law, the person distraining cannot be said unlawfully to detain that which is in the custody and care of the law.

Hence it is, that if a tender be made after impounding, and the beasts die in pound, the owner shall bear the loss; because such tender comes too late to fix any fault or injustice on the person distraining. But if the tender had been before the impounding, it seems the distrainer is answerable, because the impounding is unlawful.

5 Co. 76. a. But here it is to be observed, that the
Cro. El. 813. tender of amends must be pleaded to the
Rol. Rep. 258 lord himself, and not to the bailiff, who makes conuſance of the cause of the caption and detention in right of the lord; for that right is not barred by a tender to any other than the lord himself. — But if a tender be pleaded to the lord, and they give in evidence a tender to the lord's bailiff, where the lord was present, that won't maintain the plea; because the derivative power of the bailiff ceases where the lord is present; and they ought to prove the tender to that proper person to whom the amends belong, and who was ready to receive it. Yet if they plead a tender to the lord, and prove a distress taken by a bailiff, the lord not being present, and prove the bailiff to be the usual receiver of the lord; *qu.* if that will not be a proof of sufficient

cient tender of amends to the lord himself?

The second case where the detainer is ^{2 Inst. 107,} unlawful, is where the avowant hath return ^{341.} irreplevisable, and the owner of the beasts tender all that appears to be due on the judgment in the avowry; the detainer of the avowant is unlawful, and the owner may have his action of detinue for the detainer after the tender made. For though by the judgment the return is made irreplevisable, yet that is no final condemnation of the beasts or goods distrained; they are still to be considered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption upon payment or satisfaction of that rent or damages, for which they were originally taken.—Lord Coke assigns another remedy ^{2 Inst. 107.} for the owner to recover his beasts, and that is upon satisfaction made in court to have a writ for their delivery.

Qu. The form of this writ.

The detention then being complained of in this writ, it may not be improper to look into the antient method of trying such unlawful detention, and what remedy the owner of the beast has for it at this day. The antient method of trying the legality of the detention was very inconvenient, for the plaintiff in replevin was to have his suitors ready to prove *instante*, that he had offered a pledge, under the notion that the pledge was sufficient; the lord was then put to his law-wager, that the pledge offered

ferred was not sufficient to answer the debt, so that it was totally thrown upon his conscience to determine the sufficiency of the pledge. This method of trial was anciently practised and allowed, because originally the lord might have seized the land for non-performance of the services, and therefore, when the rigour of that law was mitigated, by turning the forfeiture into a distress, it could not be thought any unreasonable indulgence to the lord, to make him judge of the sufficiency of the pledge which was to be put into his hands while the suit depended; because in all events the lord ought to be safe.

This account of trying the legality of the detention is given by *Bracton* in the following words :

Bract. 156.
Fleta 94.

Si autem defenderit detentionem injustam, & querens sectam habeat statim ad manum, quæ examinata in omnibus concors fuit, & quod omnia facta fuerint sub eorum presentia, tunc vadiabit defendens legem se duodecima manu; in qua si defecerit, incidet in manum vicecomitis, & restituet querenti damna sua quæ habuit per illam detentionem; si autem legem fecerit dominus, tunc quietus recedet, & querens in misericordiâ, sed nulla damna recuperabit, & returnabit domino averia capta.—The lord recovered no damages where he prevailed on the law-wager, because he had no damage where the tender proved insufficient. But if the lord prevailed not on the law-wager, the plaintiff in replevin had his damages, because he really was injured by the lord's refusal, in losing the use of his

his beasts or goods, which he had a right to, upon the sufficient tender.

But the legality of the detention depend- Dr. & Stud.
 ing entirely on the sufficiency of the ten- c. 27.
 der, a more equal and better method of Cro. El. 813.
 trial was found out by the conscience of F.N.B. 69.G.
 twelve disinterested men; no way concerned
 in the event of the trial. And the point
 comes in issue in the following case. Where
 the lord impounds the beasts notwithstanding
 the sufficient tender of the tenant, the
 tenant hath no way to recover his cattle
 but by his writ of replevin; for if he takes
 them out of the pound himself, he is liable
 to an action for breaking the pound:—this
 puts the lord to his avowry, wherein he
 must shew the cause of his taking and de-
 tention; to which the plaintiff in replevin
 pleads, that after the taking, and before
 the impounding, he made a sufficient ten-
 der; and thereupon it shall be tried by a
 jury whether the tender was sufficient, and
 if it be found so, the plaintiff in replevin
 shall have damages for such unlawful de-
 tention.

But though by the common law this writ
 was made justicial for the ease of the sub-
 ject, and the more speedy administration of
 justice, yet the subject, both lord and te-
 nant, was exposed to many difficulties and
 inconveniencies in the progress of the suit,
 which were afterwards removed by several
 statutes. For,

1st. The replevin at common law was 2 Inst. 139.
 only by writ, and this application must have 5 Mod. 253.
 been to the chancery, which was too tedi-
 ous for the distant parts of the kingdom.

To

52 H. 3.

To make this remedy therefore more expeditious, it is provided by the statute of *Marlbridge, c. 21. Quod si averia alicujus capiantur, & injuste detineantur, vicecomes post querimoniam inde sibi factam, ea sine impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare possit.*—By force of

2 Inst. 139.

this statute the sheriff may hold plea in replevin BY PLAINT of any value, as he might at common law on a writ of replevin; the writ of replevin being A JUSTICES or commission for that purpose.

F.N.B. 69.E.

Co. Lit. 145.

2 Inst. 139.

16 H. 7. 14.

And to take away all the delays which attended the replevin by writ, the sheriff, by this act, may, upon complaint made, command his bailiff, either by word or precept, to replevy the plaintiff's beasts; for possibly the sheriff cannot write, which was frequently the case in those days, or has not the materials of writing with him; and this the sheriff may do out of his county court. For this act being made for the more speedy administration of justice, hath received the most favourable construction. It would be very inconvenient that the owner of the beasts, for whose benefit the act was made, should stay till the next county court, which is held only from month to month. But then the sheriff must enter the plaint at the next court, that it may appear on the rolls of the court.

Bro. tit. Replevin, pl. 46.

L. Raym. 219.

[Yet a prescription to replevy upon plaints levied out of court, is bad.]

2dly, Another mischief at common law was, that the replevin being justicial, and determinable in the county court, if the plaintiff in replevin pleaded to the lord's avowry

avowry that the tenancy was *hors de son fee*, the inferior court had no farther consequence of the action; because this plea brought THE FREEHOLD in question, which the county court, not being a court of record, had no power to try, and therefore could not proceed. By such means the lord was left without remedy to recover the beasts as his pledges; because the court could not determine the point on which the return was to be made. This was remedied by *Westm. 2. c. 2.* which gave the lord a *pone* to remove the cause into the king's courts, where that plea might be tried, and the lord be established in the possession of his services, and still have the pledges *de retorno habendo* retained for him. 13 Ed. 1.

A third mischief at common law was, that when the avowant had judgment for a return of the beasts, he had very often no benefit by his suit; because it frequently happened that, pending the suit, the tenant had sold the cattle delivered to him on the replevin, and become insolvent. The mischief arose from this, that the sheriff could only take from the plaintiff *plegiū de prosequendo* in this, as in other actions; which pledges were only to answer the amercia-ment to the king *pro falso clamore*, and looked no further: and even these being very small did soon degenerate into mere matter of form. To remedy this inconvenience the said statute of *Westm. 2. c. 2.* hath directed the sheriff, *non solummodo re-* 13 Ed. 1.
cipere plegios de prosequendo à conquerentibus,
sed etiam de averiis retornandis, si adjudi-

cetur retornand'; & si quis alio modo plegios cepit, respondeat ipse de pretio averior'.—

But the method of proceeding in this case will be fully treated of under the writ *de retorno habendo*.

2 Inst. 340.

4thly. Another mischief was, that if the plaintiff had nonsuited himself, and the avowant had judgment, yet he could not have a return irreplevisable; but the tenant might replevy the same distress *in infinitum*. This also is remedied by the

13 Ed. 1.

same statute of *Westm. 2. c. 2.* by which it is provided, *quod quam cito adjudicatum fuerit retorum averiorum distringenti; per breve de judicio, mandetur vicecomiti, quod retorum habere faciat distringenti de averiis, in quo brevi inseratur, quod vicecomes ea non deliberet sine brevi, in quo fiat mentio de judicio per justic' reddit'; quod fieri non poterit nisi per breve quod exeat de rotulis justic', coram quibus deducta fuerit loquela.* Pursuant to

Reg. Jud. 4. a.

this law, the writ *de Retorno habendo* concludes thus, after a recital of the judgment for the avowant,—“*ideo tibi præcipimus quod præd' (the avowant) averia præd' sine dilatione retornari facias, & ea ad querimoniam ipsius (the plaintiff in replevin) non deliberes sine brevi nostro, quod de præfat' judicio expressam faciat mentionem.*”

“Therefore we command you, that the aforesaid (the avowant) the beasts aforesaid without delay you return, and that you do not deliver them upon the complaint of (the plaintiff in replevin) without our writ, which should expressly mention the aforesaid judgment.”

This

This writ, which must recite the former judgment, is the writ of second deliverance, which will be treated of in its proper place.—Only here it may be necessary to ^{2 Inst. 341.} observe, that if the avowant hath judgment in the second deliverance, he shall have return irreplevisable of the beasts; but subject still to redemption by the tenant on payment of the rent; because they are still in the nature of a gage or pledge. The several other alterations that have been made in the replevin will be taken notice of under the subsequent heads.

II. Of the duty of the sheriff in the execution of the replevin; and herein of the pledges.

Whether the replevin be by plaint or writ, the sheriff, before he grants the one or executes the other, ought to take from the plaintiff pledges *de prof'* and pledges *de retorno habendo*. The first, as has been said, was at common law, to answer the amerciaments to the king *pro falso clamore*, in case the plaintiff did not prevail in the suit. The other pledges were introduced by *Westm. 2. c. 2.* for the security of the avowant, in case he should have judgment for return of the beasts.—And by this act these pledges are answerable to the avowant, if the plaintiff hath disposed of the beasts pending the suit. And if the pledges are insufficient, the sheriff is made answerable by that statute for their insufficiency.

And it seems the pledges *pro retorno habendo*, may be by bond even of the plaintiff in replevin himself. The condition

Dalt. Sher.
277. 439.
Cro. Car. 446.
3 Mod. 57.
Comb. 1. S. C.
Skin. 244.
S. C.

Dalt. Sher.
440.
Offic. Brev.
222.

Ld. Raym.
278.

tion of which is, not only that the plaintiff shall prosecute the suit in replevin, but also that he will make return of the beasts, if return thereof be adjudged by law, and also to save harmless and indemnify the sheriff for delivery of the said beasts: for the sheriff being answerable for the sufficiency of the pledges, may take the security as he pleases, since it is at his own peril.

Cro. Car 446.
1 Jones 378.
D. H. Sher.
434.

These pledges are in the nature of sureties *pro retorno habendo*, and therefore money or any other cattle being a pawn, is not a pledge within this statute; for the process, as shall be hereafter shewn, is by *scire facias*, which is a process to bring the pledge or surety into court to shew cause, and therefore cattle cannot be a proper pledge. For this reason, a sheriff has been adjudged to be liable to an action on the case for taking money, as a pledge *de retorno habendo*; because the money was not such a pledge as the statute directs. And it seems there need not NECESSARILY be more pledges than one, if that be sufficient; though the words of the act are *pledges* in the plural number: because if one pledge be sufficient, the defendant hath no loss, and therefore the intention of the statute is answered which provides for the defendant's safety.

[Now, for the greater security of persons distraining FOR RENT, it is provided by statute (11 G. 2. c. 19. §. 23.) that sheriffs and other officers, having authority to grant replevins, shall in every replevin of a distress FOR RENT take in their own names, from

from the plaintiff and two sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer) and conditioned for prosecuting the suit with effect and without delay, and for returning the goods in case a return shall be awarded, before any deliverance be made of the distress; and such sheriff or officer taking such bond, shall at the request and costs of the avowant, or person making confession, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal in the presence of two or more witnesses, which may be done without any stamp; provided the assignment be stamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the court may by rule give such relief to the parties upon such bond, as may be agreeable to justice; and such rule shall have the effect of a defeazance.]

The sheriff having thus taken pledges ^{2 Inst. 139,} from the plaintiff in replevin, he ought ^{140.} forthwith to make deliverance of the goods ^{F.N.B.68.F.} or cattle distrained; but if the distress was taken within a liberty and impounded there, the sheriff ought first to issue his warrant to the bailiff of the liberty, having return of writs, to make deliverance. And if the bailiff makes no answer, or as the statute of *Marlbridge* says, c. 21.—*Ea deliberare noluerit, tunc vicecomes pro defectu ipsius ballivi ea faciat deliberari.*—This act, as

to this part of it, was made to enlarge the power of the sheriff, by empowering him to enter into the liberty to make delivery, where the bailiff was negligent. Whereas at common law the sheriff could not enter into the liberty without a *non omittas*, which was too dilatory.

2 Inst. 140.

And by this act, if a distress was taken out of a liberty and impounded within it, the sheriff might enter the liberty without any previous warrant to the bailiff; because the caption, which is one of the points complained of in the replevin, was in the county, and out of the liberty; and therefore the right to make a deliverance, ought to be in that officer, within whose district or jurisdiction the cause of complaint first arose. And all this is law, whether the replevin be by plaint or by writ.

If the distress be drawn into a house, castle, or other strong hold, the sheriff or his bailiff, after demand made for deliverance of the distress, may break open the house or castle to replevy them.—This seems to be the common law;—for though a man's house is privileged by common law for himself, his family, and his own goods, so that the sheriff cannot break it open to attach any of them in a civil action at the suit of a private person;—yet a man's house could not privilege or protect the goods of ANOTHER person unjustly taken, so as to prevent the officer to make replevin; because the privilege and security of a man's house could protect but his own goods.—This practice however, of driving distresses into strong holds, was so frequent in the
barons

barons wars, and the poorer sort suffered so much from the men of power, that the statute of *Westm.* 1. c. 17. expressly gives ^{2 Inst. 193.} this power to the sheriff, or his officer, to break the house to make delivery of the cattle, whether the replevin be by plaint or by writ.—But this, as is said, must be after demand made, and notice given to the lord to suffer them to be replevied.

And, to deter the person distraining from refusing or neglecting to deliver the distress, the statute further directs, that the castle, or strong hold, shall be razed and thrown down; but this must be on a suit ^{2 Inst. 194.} in behalf of the king, wherein all parties concerned in interest must first be heard. And by this act, if the bailiff of a liberty, having return of writs, shall not make deliverance for the reason aforesaid, the sheriff may proceed without delay, or any new authority, to make replevin in manner afore-mentioned. Though in other actions, even in executions, at the suit of private persons, he cannot enter a liberty, without a *non omittas*.

If the replevin be executed, and the deliverance made, where it is by plaint, the bailiff, at the time he makes deliverance, ought also to attach the defendant by his goods, to make him appear at the next court day; for in this action the attachment is the first process; because the replevin complains of a tortious taking, which is in nature of a trespass.

Where the replevin is by writ, and the sheriff executes it before the *alias* or *pluries* comes ^{F. N. B. 70. Dalt. Sher. 440.}

THE LAW OF REPLEVINS.

comes to his hands, the sheriff may hold plea of it in his county court; but either party may remove it by *pone* or *recordare* into the courts above; the plaintiff without cause, and the defendant upon cause shewn.

This writ of *pone*, if it be taken out by the plaintiff in replevin, hath a clause in it, to summon the defendant to appear in the court above, at the return of the writ; *quod tunc sit ibidem præfatus A. (the plaintiff) inde responsurus*; and so *vice versa*. If the replevin be removed by the defendant, then the *pone* commands the sheriff, "*quod dicat præfatus A. (the plaintiff) quod sit ibi loquelam suam versus prædictum B. (the defendant) inde prosecuturus, si voluerit, &c.*" — "To tell the aforesaid *A. (the plaintiff)* to be there to prosecute his plaint thereof against the aforesaid *B. (the defendant)* if he shall think proper." And by this means both parties have days in the court above.

F.N.B.68.E. If the sheriff doth nothing upon the first writ, the plaintiff may have an *alias*, and after that a *pluries* replevin. In the *pluries* is always inserted this clause, "*vel causam nobis certifies, quare mandatum nostrum, alias tibi inde directum, exequi noluisti vel non potuisti.*" — "Or certify your reason to us why you would not or could not execute our commands heretofore to you hereupon directed."

The same may be inserted in the *alias*, if the plaintiff pleases, and then both the *alias* and *pluries* are returnable in the king's bench

bench or common pleas; and the *pluries* always determines the power of the sheriff to hold plea of the replevin in the county; and so doth the *alias*, where the said clause of *vel causam nobis certifies*, &c. is inserted. The reason is, because this clause gives either party a right to call upon the sheriff, in the courts above, to give an account of the execution of the writ; and this on the pretence or supposition, that the sheriff hath not legally executed the writ. The sheriff, thus called upon, cannot give the court an account how he hath executed the writ, but by his return on the writ itself; and that cannot appear judicially to the court, till the writ and the return be filed; and the sheriff having thus parted with the writ, he has no authority to proceed farther in the court below.

By this means the plaintiff in replevin may controvert the sheriff's return, and shall recover damages against him, if it be found to be false, or not duly made.—This is allowed the plaintiff, not only for his damages, but also to intitle the king to a fine against the sheriff for his contempt; and is the most expeditious way to oblige the sheriff to make the deliverance fairly, that the plaintiff may not want his beasts to carry on his husbandry.—But if the sheriff injures the defendant in the execution of the replevin, by taking some of his cattle, the defendant has his action of trespass against him to punish him, as in all other cases of trespass. Here we may observe

serve one thing peculiar to this writ of replevin, that the defendant on the return of the *alias* and *pluries* has no day in court; nor is he so much as summoned to appear by the writ in the court above; whereas in all other actions, the defendant by the very original is put to his pledges for his appearance.—But the reason of the difference is this. In other originals, the defendant is but summoned to answer the plaintiff's demands, and the plaintiff by such writ gets nothing from the defendant till the event of the suit, and therefore the defendant must have a day in court by the original.—But in replevin the plaintiff hath his beasts restored to him on the execution of his writ, and the defendant shall never have return, unless in his avowry he can justify the caption; so that from hence it appears the defendant need not be summoned in this writ; because it is plainly for his interest to do so, otherwise he can never have a return of the cattle.—Thus the defendant becomes plaintiff or actor.—Hence it follows that the parties in replevin, may appear and plead at any other term than that in which the replevin is returned; because having no day in court on the return, as is before observed, there can be no discontinuance of the suit, though the plaintiff should not declare in the same term.—If the plaintiff should not declare in replevin, the defendant, though he hath no day in court, may however come in, and oblige the plaintiff by rule of court to declare; because otherwise the defendant could
never

1 Rol. Abr.
581.

never have the judgment of the court, for a return of the beasts.

But if the plaintiff should of himself declare without any compulsion from the defendant, as he may do, the defendant is brought into court by attachment, &c. to plead; and if the plaintiff shall obtain judgment by default, what remedy hath he for his damages? Offic. Brev. 413.
Dyer 246. a.
Raft. Entr. 570. a.

It is usual now for the plaintiff to take out the replevin, *alias* and *pluries*, at the same time; and if he has a mind to take the cause at once out of the sheriff's hands, he may deliver the *alias* or *pluries* as he thinks fit to the sheriff, without ever shewing him the original writ.—By this the plaintiff, as is already observed, has a right to call for the sheriff's return, and the sheriff ought himself to appear in the court above, to purge his contempt, for disobeying or not executing the original writ, which the law presumes was delivered to him; and then the sheriff may excuse himself by making an honest return on the *alias* or *pluries*,—*Et quod nullum aliud breve*, &c. came to his hands. And thus the plaintiff, if he pleases, may at once oust the sheriff of his jurisdiction, without the trouble of removing the plea out of the sheriff's court by *pone*. F. N. B. 68.
E.
Raft. Entr. 570. a.

III. We come now to the process in replevin to make the defendant appear.

And here it is to be known, that the replevin is *vicontiel*, and is a commission to give the sheriff authority to gage deliverance of the beasts, and therefore there is no day given to the defendant by this writ. Reg. 31.

But

But on this commission the sheriff makes out a precept to deliver the beasts, and also an attachment to the defendant to appear at the next court day.—So if it be by plaint, the precept is made to the bailiff to deliver the beasts, and to attach the defendant. And the reason why attachment is the first process, is, that replevin complaining of a tortious taking, is in nature of a trespass; and there an attachment *per plegios* is the first process, lest the defendant should escape.

But if the sheriff do not execute the replevin, then an *alias* goes out, in which there may be a *vel causam nobis significes*; and the reason is, that the plaintiff being deprived of the use of his beasts, which he is obliged to sustain in the pound, the law allows that he should in the *alias* insert the third process; because though the officer, as a defaulter, is not answerable for not executing mesne process, till after two defaults; yet, because the beasts may be eloiigned, the *withernam* may issue on the second process, and the *causam nobis significes* be put in the *alias*. And this *alias* is returnable into the king's bench or common pleas. In the common pleas, because it is a civil plea; and in the king's bench, because it is in the nature of a trespass. It is also returnable into chancery, because he may have a *withernam* thence upon an *elongata*, since there is another original, viz. a *pluries*, which is yet to be issued out of that court.

If there be not *causam nobis significes*, it is only *vicontiel*, as the first writ. In the *pluries* they must put in the clause, *vel causam*

causam nobis significes, because there have been two neglects already in the process. — When the *pluries* issues, it has been much disputed whether the sheriffs *vicontiel* power be determined. And it is said, in one case, ^{2 H. 7. 5.} that since the writ is to replevy *vel causam* ^{Fitz Abr. tit. Replev. pl. 16.} *significes*, the *vicontiel* power continues. — But if the sheriff does not replevy, then he is to shew cause why he did not; and this is argued to be the sense of the writ, from the disjunctive words contained in it.

But I take it, that the *vicontiel* power is ^{Fitz. Abr. ubi supra.} determined by the *pluries*. 1. Because the sheriff has been twice guilty of neglecting his duty, and therefore is not to be trusted with judicial power. 2. He is answerable to the court how he has obeyed the writ; and therefore the court must have the writ, to see whether he has done his duty or not. And if the court be intitled to the writ, to see whether the officer has done his duty, he cannot proceed on the writ.

[The *pluries* replevin supercedes the proceedings of the sheriff, and the proceedings are upon that writ, and not upon the plaint; as they are, when the plea is removed by *recordari*. *Ld. Raym. 617.*]

By the *pluries* there is no day in court, either to the plaintiff or defendant, but only to the sheriff in order to fine him for disobeying the first writ. [But though there is neither summons nor attachment in the *pluries*, yet the return of it is a good day in court to the parties. And the entry in such case is, that the defendant *attacbiatus est ad respondendum de placito quare cepit*, &c. for though there is no actual attachment, yet there

there is an attachment in consequence of law, the defendant being obliged to appear upon the peril of a *withernam*. Ld. Raym. 617. Salk. 583. S. C.] If the parties neglect to appear on the return of the *pluries*, the way, to give them day, is as follows.

Raft. Ent.
570. a.

If the plaintiff comes into court, and *obtulit se*, at the day on which the sheriff is to shew cause to that court, why he did not execute the first *vicontiel* process, there, as it appears by the entries in *Raftel*, he shall have an attachment against the defendant, to bring him in to answer, and this writ gives them both a day in court.

The reason is, that replevin is in nature of a trespass, and on every trespass the attachment is the first process; and therefore as well in the sheriff's court below, as in the court above, the plaintiff may have an attachment in the first process, and if the defendant does not appear, and *nulla bona* be returned, then on the statute 25 E. 3. *ch.* 17. they may have a *capias* and process of outlawry.—But at common law, there was only a distress infinite; because there was no fine to the king on the replevin; unless where the *elongata* or claim of property was returned by the sheriff; for these being contempts of the king's process, there was a fine at common law, and therefore a *capias* in the common process came in by the statute.

Bro. tit Jour.
pl. 82.

But if the defendant comes in at the day the sheriff has in court, he cannot demand the plaintiff, because the plaintiff has given the defendant no day in court; and if the defendant hath no day, he cannot demand

demand the plaintiff under the peril of a nonsuit; and therefore the method is for the defendant to have a special writ to warn the plaintiff to come into court and prosecute his plaint, which is in nature of a *venire*; and if the plaintiff does not come into court at the return of such writ, then he shall be nonsuited, and the pledges amerced.—In the same manner where there is a vitious *pone*, that gives the defendant no day in court; yet the record being removed, the court proceeds on the first writ; and on such writ if the defendant appears, the plaintiff is not demandable, because there is no day given to the defendant, but he has a special writ to warn the plaintiff to come in and prosecute, and if the plaintiff does not on such writ appear, he is nonsuited.

IV. Of the process where the goods are eloigned; and herein of the writ of *withernam*.

Withernam is derived from the Saxon words *weder* (other) and *naam* (distress) signifying another distress, instead of the former, which was eloigned. *Vetitum namium* signifies a forbidden distress; and therefore though a distress were originally lawful, yet if it be detained against the replevin, it is *vetitum namium* and unlawful.

The *withernam* is part of the *lex talionis*, which as it prevailed in the cases of maihem, where the judgment of old was in this kingdom,—eye for eye, and tooth for tooth,—so was it in the case of taking and detaining against pledges,—beast for beast.

Withernam was twofold.

In

In the county below; and
In the courts above.

Reg. 82.

1. In the county below, though the sheriff's bailiff returned that the beasts were eloigned, yet the *withernam* did not IMMEDIATELY go, because the defendant was not to lose his own beasts on the return of a bailiff, against whom, if the return were false, he could have no satisfaction.—Therefore in such case, there was an inquest of office holden by the sheriff, to see whether the beasts were found to be eloigned or not; and if the beasts were found eloigned, then there issued a *withernam*, for the eloignment found by the jury, *secundum legem talionis*.

2. In the courts above, the *withernam* is awarded on the *elongata* returned. For the king's minister having returned, that the beasts were eloigned, so that he could not do execution, there is a proper ground to award this process.—

First, because the sheriff is liable for a false return, who is a person sufficient to answer the party. Secondly, because the sheriff's return is supposed to be true till the contrary appears. And there is no mischief to the defendant in this case, since on producing the cattle which he has taken, he may have his beasts again; and therefore it was proper such a writ should go out *secundum legem talionis*, on the sheriff's return, *without any inquest*, rather than the plaintiff should want his cattle, and his husbandry stand still in the mean time.

F. N. B. 73.
E.

This writ lieth where a man takes the goods or cattle of another man, and the party

party sueth a replevin by writ, and an *alias* and *pluries*; and upon the *pluries* the the-
riff doth return, that the cattle or goods
are eloigned, &c. then this writ of *wither-*
nam shall issue out of the court where the
pluries is returned;—returnable in the
king's bench or common pleas. And the
form of the writ is such:

“ *Rex vic. Linc. salutem. Quum pluries*
tibi præceperimus, quod juste, &c. A. averia
sua quæ B. &c. vel causam, &c. quare man-
datum nostrum, pluries tibi inde directum, ex-
equi noluisti vel non potuisti; ac tu nobis
significaveris, quod postquam prædictus B. ave-
ria prædicti A. cepit in comitatu tuo, ea fu-
gavit de comitatu prædicto in comitatum B.
per quod ea eidem A. replegiare non potuisti;
nos malitiæ ipsius B. obviare volentes in hac
parte, tibi præcipimus quod averia prædicti
B. in balliva tua inventa, sine dilatione capias
in withernam, & ea detineas, donec eidem A.
averia sua prædicta secundum legem & con-
suetudinem regni nostri replegiare possis, juxta
tenorem mandatorum nostrorum prædictorum,
prius tibi, &c.”

“ George the third, &c. To the sheriff
of &c. greeting: Whereas we have often
commanded you that justly, &c. to *A.* his
beasts, which *B.* &c. or the reason, &c.
wherefore you would not or could not exe-
cute our command hereupon often directed
to you; and you have signified to us that
after the aforesaid *B.* the beasts of the
aforesaid *A.* had taken in your county, he
drove them out of the aforesaid county into
the county of *B.* by reason whereof you
could not replevy them to the said *A.*

G

We,

We, being desirous to prevent the mischievous design of the said *B.* in this behalf, do command you, that without delay you take in *withernam* the beasts of the aforesaid *B.* found in your bailiwick, and detain them until you are able to replevy to the said *A.* his beasts aforesaid, according to the law and custom of our realm, and pursuant to the tenor of our commands aforesaid, before to you, &c."

11 H. 8. 16. But this writ does not lie upon suggestion only that the beasts are eloigned, by reason whereof the sheriff cannot replevy them, &c. for this being an award *secundum legem talionis*, cannot be on a surmise, but only be where the eloignment is found by inquest low, or returned above, by the proper officer.

F. N. B. 73. And this writ shall not issue out of chancery, unless *elongata* be returned into that

22 H. 6. 22. court upon the *alias*, &c. for the *elongata* being the foundation of the *withernam*, wherever the *elongata* is returned, there the *withernam* must be awarded; and since the *alias*, as it is said, is returnable into chancery, the *withernam* must thence issue. But though it goes out from thence, it is returnable into one of the benches, because it gives the defendant day thereon to proceed; for since the defendant's goods are taken *secundum legem talionis*, he must have a day given to dispute the legality of such taking.

F. N. B. 73. The defendant shall have a day in this writ by attachment, and not otherwise; as

7 H. 4. 27. if *elongata* be returned on the *pluries reple-*
45 E. 3. 26. *giari facias*, then the writ of *withernam* has
35 H. 6. 47. this clause,—"*Et si querens fecerit, &c. tunc*
Dyer 189. *pone*

pone defendentem, &c. ad respondendum tam domino regi de contemptu, quam præfato querenti de captione et injustâ detentione catallorum prædictorum."

"And if the plaintiff shall make, &c. then put the defendant, &c. to answer as well the lord the king for the contempt, as the aforesaid plaintiff for the taking and unjust detention of the aforesaid cattle."

The attachment is put into this writ, because it is not a *vicontiel* writ, as the replevin, but a judicial writ, founded on the supposition of an original unlawful taking; and likewise of a contempt, by not permitting the sheriff to gage deliverance.

But it seems there had been no such Dyer 189. clause in the *withernam*, if it had been on 44 Aff. 15. a plaint in the county; for the sheriff cannot upon his plaint punish the eloignement, as a contempt of the authority of the king, since it is only a contempt of the process of his own court. For the same reason it seems, that if a plaint be removed by *recordare*, which gives the parties day in court, the *withernam* shall go without such special attachment, to answer the contempt of the sheriff's court below. But if the replevin had been by writ, and such writ had been removed by *pone*, and the sheriff had returned an eloignement, there it seems the attachment for the contempt had been in the *withernam*, because there the plaintiff had been attached for his contempt to the king.

The writ of *withernam* ought to rehearse F. N. B. 73. the cause which the sheriff returneth, for G. which he cannot replevy; as to say,

G 2

"Ac

"*Ac postquam prædictus B. catalla vel averia illa cepit, catalla vel averia illa (aut bovem vel equum illum) elongavit extra ballivam tuam, ita quod nullam deliberationem inde eidem A. facere potuisti, sicut nobis significasti, &c. Nos tibi præcipimus quod catalla vel averia, &c. prædicti B. sine dilatione cap' in withernam, et ea detineas donec eidem A. &c.*"

"And after the aforesaid B. had taken the cattle or beasts, he eloigned the cattle or beasts, (or ox, or horse) aforesaid, out of your bailiwick, so that you could not make any delivery of them to the said A. as you have signified to us, &c. We command you that without delay you take *in withernam* the cattle or beasts, &c. of the aforesaid B. and them detain until to the said A. &c."

Reg. 82.

And there are very many causes that the sheriff may return upon the *pluries*, wherefore he cannot replevy, whereof divers of them do appear in the *register*, which may be seen there.

F. N. B. 74.
A.

And if the sheriff return upon the *pluries* replevin, that he hath sent unto the bailiff of the liberty, who hath return of writs, and that the bailiff hath given answer that he cannot execute the writ, because he cannot have a view of the cattle or goods which were taken; then the court in which such return is made, shall award a writ of *withernam* directed unto the sheriff; and the sheriff shall thereupon make his precept unto the bailiff of the liberty; and if the bailiff of the liberty doth not make a return thereof unto the sheriff, then the sheriff shall return the whole matter in court, and thereupon the court shall award a writ of *withernam*,

withernam, and a non omitas with the same ; and the form of the writ shall be such :

“ *Rex vic. B. salut'. Cum plur' &c. [usq; ibi, 'vel non potuisti',] ac R. de C. balliv' libertat' de J. cui return' brev' nostr' habere fecisti, tibi responderit, quod executionem brevis illius facere non potuit, &c. sicut tu nobis significasti ; per quod tibi praeceperimus, quod averia praedicti B. in ballivā tuā sine dil'one caperes in withernam, et ea detineres donec eidem A. averia sua, &c. vel causam nobis significares, &c. ac tu nobis returnaveris, quod idem R. balliv. libertat. praed. cui return. &c. habere fecisti, nullum tibi inde dedit respons'. Tibi praecipimus, quod non omittas propter libertat' praedictam, quin eam ingrediaris, et capias, &c. in withernam, donec, &c. juxta, &c. Teste, &c.*”

“ George the third, &c. To the sheriff of &c. greeting : Whereas many times, &c. [‘until or could not execute, &c.’] And R. of C. bailiff of the liberty of J. whom you have made to have the return of our writ, hath answered you that he could not execute that writ, &c. as you have signified to us ; wherefore we commanded you, that you should without delay take in withernam the beasts of the aforesaid B. in your bailiwick, and them detain until to the same A. his beasts, &c. or should signify to us the reason, &c. why you could not ; and you have returned to us, that the same R. bailiff of the liberty aforesaid, whom you have made to have the return, &c. gave you no answer thereupon. We command you, that you do not omit by reason of the aforesaid liberty, but that you enter

it, &c. and take, &c. in *withernam* until, &c. pursuant, &c. Witness, &c."

F. N. B. 74.
B.
Stat. Marl.
c. 21. Westm.
1. c. 17.

And if a man's cattle be distrained, and he sue a replevin, by plaint made unto the sheriff, for which the sheriff makes a precept to the bailiff to replevy them, and the bailiff return at the next county court, that he cannot replevy the cattle, because they are eloigned, or that he cannot have view of the cattle; then the sheriff in the same county court ought to make enquiry, if it be true which is returned; and if it be so found by the jury, then the sheriff, *ex officio*, shall make a precept unto his bailiffs in the nature of a *withernam*, to take as many cattle of the other party.

Dalt. Sher.
437.

[This precept must be in writing, and not by word only; because it is in nature of a second execution of the award of the county court, and therefore not like the plaint in replevin, which, for the suddenness of the thing, may be verbal only. But in the register it is said that the sheriff is not bound to make such precept without a writ.]

Reg. 82.

And if the sheriff make such precept, to take the other's cattle in *withernam*, and the bailiff will not execute the writ, then the party may have a special writ out of the chancery, directed unto the sheriff, commanding him to do *withernam*, and to do execution of the first judgment; and the writ shall be such:

"*Rex vic. &c. Monstr' nobis A. quod cum B. et C. averia prædicti A. cepissent et injuste detinuissent, idemq; A. coram te prosecutus fuisset,*

isset, pro averiis prædictis sibi, secundum legem et consuetud. regni nostri, replegiandis; ac licet per J. ballivum tuum, quem ad averia prædicta prædicto A. repleg' misisti, testatum fuerit, et per inquisitionem (prout moris est) in pleno com' tuo factum compertum, quod idem balliv' visum de eisdem averiis habere non potuit, ad eadem præfat' A. replegiand'; per quod in pleno com' tuo consideratum fuit, quod averia prædict' B. et C. in ballivâ tuâ caperentur in withernam, et detinerentur quousq; eidem A. averia sua prædicta secundum legem et consuetud' regni nostri repleg' possint; idem tamen A. executionem considerationis prædictæ nondum affecutus est, ad damnum ipsius A. non modicum et gravamen; et quia præfato A. subvenire volumus in hac parte, tibi præcipimus quod si ita sit, averia prædictorum B. et C. cap' in withernam, et ea detineas, quousq; eidem A. averia sua prædicta repleg' possis, secundum legem et consuetud' regni nostri, et juxta consideration' prædictam, &c."—

"George the third, &c. To the sheriff of &c. A. hath shewn to us, that whereas B. and C. took and unjustly detained the beasts of the aforesaid A. and the same A. before you prosecuted for the beasts aforesaid to be replevied to him, according to the law and custom of our realm; and although it was attested by I. your bailiff, whom you sent to replevy the beasts aforesaid for the aforesaid A. and the fact found by inquisition (as usual) in your full county, that the same bailiff could not have a view of the same beasts in order to replevy the same to the aforesaid A. whereupon in your full county it was considered, that the beasts of

the aforesaid *B.* and *C.* in your bailiwick should be taken *in withernam* and detained until to the same *A.* his beasts aforesaid, according to the law and custom of our realm, should be replevied ; yet the same *A.* hitherto hath not obtained execution of the consideration aforesaid, to the no small damage and grievance of the said *A.* and because we are willing to assist the aforesaid *A.* in this behalf, we command you, that if it be so, you take *in withernam* the beasts of the aforesaid *B.* and *C.* and them detain until you are able to replevy to the same *A.* his beasts aforesaid, according to the law and custom of our realm, and pursuant to the consideration aforesaid, &c."

Reg. 83. a.

Salk. 582.

[This is a writ *de executione judicii*, and therefore recites the award of the county-court as a judgment: *sed quære* ; for, in a case reported by *Salkeld*, the court denied that a *withernam* is an execution, for that cannot be before judgment ; and they held it to be only a mesne process. But in this writ, there is no attachment for contempt against the defendant ; because the proceeding was not by the king. And this writ seems to be designed to prevent the sheriff's sleeping upon the judgment of *withernam* in his own court ; for though it be not returnable into any of the king's courts, yet the king's writs are always to be obeyed, and an attachment lies upon the sheriff's disobedience.]

F.N.B. 74.E.

9 E. 4. 48.

And by this writ it appears, that the sheriff may award *withernam*, on replevin sued by plaint, if it be found by inquest in the county, that the cattle are eloigned, according

according to the bailiff's return, &c. But upon the *withernam* awarded in the county, if the bailiff do return that the other party hath not any thing, &c. he shall have an *alias* and a *pluries*, and so infinite; and he hath no other remedy there, because no *capias* lies but in the king's courts.

But upon a *withernam* returned in the king's bench or common pleas, if the sheriff do return that the party hath not any thing, &c. there a *capias* shall be awarded against him, and *exigent* and process of outlawry.

In replevin sued by writ, if at the *pluries* returnable the sheriff doth return, *quod averia elongata sunt*, &c. and the defendant appears, the plaintiff shall not have a *withernam*; because the defendant appears at the day when the sheriff returns the *pluries*; which is a voluntary appearance, since there is no day given him; therefore he has time to purge his contempt, by gaging deliverance of the cattle. But if he doth not gage deliverance of the cattle, it seems they may either award a *withernam*, or commit him for his contempt.

And if the defendant's cattle be taken in *withernam*, they shall not be delivered to the plaintiff, but the sheriff shall keep them *quousque*, &c. and the same appears by the words of the writ. But it is said that it is the usage in the king's bench, that they shall be delivered unto the plaintiff; by which it seems that the form of the writ of *withernam*, there is different from that in the register.

This

F.N.B. 74.C.

20 E. 4. 11.

28 E. 3. 57.

F.N.B. 74.D.

2 H. 4. 9.

Bro. Abr. tit.

Withernam,

pl. 3.

2 H. 4. 9.

Reg. Orig et
Jud.
Bro. Abr. tit.
Withernam,
pl. 3.

This is a point that has been several times controverted, and some of the clerks made the distinction between the practice of the king's bench and common pleas; but the true distinction is between the ORIGINAL and JUDICIAL writ of *withernam*; by the former the sheriff is to take *et ea detinere donec eidem*, &c. which obliges the sheriff to detain the beasts in his own custody; but in the judicial *withernam* the words are, *capias in withernam, et salvo et secure custodiri facias, donec*, &c. which is to be interpreted, that he must deliver them to the plaintiff upon good security, for that is making them to be safely kept.

The reason of the difference is this, that on the *vicontiel* writ below, where it was found that the beasts were cloigned, the award of taking the defendant's beasts could be only *quousque* he gaged deliverance; for even an execution in the sheriff's court was no more than levying a pain, to make the party perform the sentence of that court; for they could not execute the sentence of that court, by changing the property, or delivering it over to the suitor, but by levying pains to make them perform it. And when the return of *elongata* is made into chancery, the *withernam* goes out as a *vicontiel* process, and is conceived in the same manner as it is below; and therefore in the writ *de executione faciendâ in withernam*, there is no return into the king's courts. But where the *elongata* is returned into the king's bench or common pleas, there the *withernam* goes out as a judicial process, and there the courts, who can

Raft. 702, 4.
Co. Ent. 612.
b.

1 Co. 75.
Dyer 189.

can alter the property, have made it *secundum legem talionis*, viz. that the defendant's goods shall be delivered to the plaintiff to make use of them, until his own are restored. And it was said to be the practice of the king's bench, because that was the court where the *lex talionis*, in case of murder and *maibem*, first settled the practice.—

Where the sheriff in his county levies goods of the plaintiff in *withernam*, after a return hath been awarded on a nonsuit, if he doth not deliver them to the defendant, he shall have an action against the sheriff.

On a *recordare* the plaintiff declares, and the defendant avows; the plaintiff prays the defendant may gage deliverance, and the defendant pleads that part of the beasts were delivered, and the other dead through the plaintiff's default; to this the plaintiff replies, that he commenced a replevin by plaint, that the sheriff made deliverance, and took security to have return, or the value; that he was nonsuit in replevin, and on this the plaintiff took from him 20 s. on a *withernam*, and of this he would have the defendant gage deliverance; and it was insisted that it ought to be delivered by the defendant, because he had avowed the taking, and that the defendant might have an action against the sheriff: but in order to have deliverance, the plaintiff was forced to take issue, that the sheriff delivered the 20 s. to the defendant.

The writ of *withernam* is *ad respondendum tam domino regi de contemptu, quam parti de damno et injuriâ*; for to eloign the goods

Fitz. Abr. tit.
Gage-Deli-
verance, pl. 8.

25 E. 3. 47.
Fitz. Abr. tit.
Gage-Deli-
verance, pl. 8.

Raft. Ent.
701. b.

35 H. 6. 47.

was

was to stop the replevin, and hinder the plaintiff from pursuing his just right, for which he was fineable to the king.

Stat. Marl. c. 3. 2 Inst. 105. Dalt. Sher. 435.

If on the *withernam* the sheriff returns that the defendant hath no goods, a *capias* issues and process of outlawry; and this was at common law, both in the writ of *withernam* and the writ *de proprietate probandâ*: because, on both these writs, a contempt is supposed and appears against the defendant by the return of the sheriff; and therefore the party is fineable for his contempt: and wherever there was a fine for the king, a *capias* lay at common law, as it did for a trespass *vi et armis*, where there was a fine for the king. The 25 E. 3. c. 17. gives the *capias* in replevin as mesne process; but this *capias* does not lie in the sheriff's court, for it is given as in account, which was always in the king's courts, on the sheriff's return of *nulla bona* upon the attachment.

Where the *retorn' habend'* is awarded for the defendant, *withernam*, *capias*, and process of outlawry lies against the plaintiff, because there likewise is a contempt against the king.

2 Inst. 106.

And here we must take notice, that the statute of Marl. c. 4. which says, that *nullus de cætero faciat ducere distractiones quas fecerit extra com' in qua captæ fuerint, et si, &c. puniatur per redemption' veluti de re facta contra pacem*, and gives a fine to the king upon an eloignement returned by the sheriff in

in the king's court, is but in affirmance of the common law.

If the sheriff return that the distress is eloined, so that he cannot deliver them upon the replevin, or upon the *retorno habendo*, the *withernam* goes; for where it appears there cannot be a delivery made of the same, the law commands an equivalent *secundum legem talionis*.

In a replevin at the *pluries* returnable, F.N.B. 74. E. if the sheriff doth return *quod averia elongata sunt*, &c. and the defendant doth appear, and plead that he did not distrain them, the plaintiff shall not have *withernam*. And so if the defendant at the *pluries* returned, appear and plead that the cattle were dead in the default of the plaintiff, the plaintiff shall not have *withernam*; for if he did not take them, or if the cattle be dead by the default of the plaintiff, then, *secundum legem talionis*, he ought not to have the defendant's cattle; and therefore, while this is in issue, no *withernam* ought to be awarded.

And if in replevin *withernam* is awarded, F.N.B. 74. E. and afterwards the defendant avows the 30 E. 3. 9. taking as his proper goods, or for a heriot; Ld. Raym. or denies the taking; the plaintiff shall 614. gage deliverance of the *withernam*; for the *withernam* ought not to have been awarded. But the defendant shall not gage deliverance Carth. 287. of the goods taken, since he claims them as his own. And though the defendant might have come *in pais* and claimed property, yet, whenever he claims, it is sufficient to stop the deliverance.

7 H. 4. 28.

If *withernam* be taken, and afterwards the defendant comes into court and makes conuſance as bailiff to J. S. and prays aid of him, who joins in aid, the defendant ſhall have deliverance of the beaſts in *withernam*; for it belongs to the lord to make deliverance of the firſt beaſts, and not the bailiff; becauſe the bailiff took them only as a ſervant, and therefore his cattle ought not to be taken as a compensation for the maſter's not reſtoring the diſtreſs.

2 Leon. 174.
pl. 211.

[The defendant in replevin avowed for *damage feaſant*, and had judgment for a return and damages; the court awarded a *retorno habendo*, the ſheriff returned *elongata*, and in conſequence a *withernam* iſſued; upon this, the plaintiff came into court, and tendered the damages aſſeſſed by the jury, and prayed a ſtay of the *withernam*, which was granted by the court, on the plaintiff's paying a ſmall fine for his contempt.]

C o. Eliz.
162.

And in another caſe, where the plaintiff's cattle had been taken on a *withernam*, which iſſued under ſimilar circumſtances, the plaintiff ſatiſfied the defendant his damages, and then prayed a writ of reſtitution of his cattle; upon which the court adjudged, that though the cattle were not repleviſable, yet that, upon ſatiſfaction, they ſhould be reſtored to the plaintiff by a writ of reſtitution; and this they declared to be the uſual courſe.]

F.N.B.74.F.
Tr. 7 R. 2.

And the defendant in ſome caſes ſhall have a *withernam* againſt the plaintiff; as if the defendant has a return awarded for him, and he ſueth a writ *de retorno habendo*, and the

the sheriff return upon the *pluries*, *quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, according to the statute of Westm. 2. c. 2. and if they have nothing, then he shall have *witbernarn* against the plaintiff, of the plaintiff's cattle. But in one case, it was held, 5 H. 5. 7. that the avowant may have a *witbernarn* presently, for it was at the common law.

Hence it has been doubted, whether on the statute of Westm. 2. c. 2. that gives pledges *de retorno habendo*, it be necessary to sue out a *scire facias*, and to have a *nihil* returned, before you can have a *capias in witbernarn*; inasmuch as you must shew it impossible to have the cattle returned, before you can, by the *lex talionis*, come at the goods of the plaintiff. But it seems the better opinion, that the statute only gives him another security and remedy by *scire facias* against the pledges, and does not take away nor alter the remedy given by the common law.

In replevin, *Witbernarn* is awarded against the defendant, and afterwards the defendant claims property, and the parties are at issue; the plaintiff gages deliverance of the *Witbernarn*, and a writ issues for him to make deliverance accordingly; the sheriff returns *elongata*, on which *Witbernarn* is awarded against the plaintiff, and upon *nil* returned, a *capias* issues; then the issue is found for the plaintiff, upon which he has judgment.—Now upon the return of the *pluries* against the plaintiff, the defendant prays an *exigent* against him, & *habuit*; and by *Thirwit*

5 H. 5. 7.
Fitz. Abr. tit.
Process, 115.

11 H. 4. 10.
F.N.B. 74. A.
Bro. Abr. tit.
Witbernarn,
pl. 5.

Thirwit the defendant shall recover damages for the detaining of the *withernam* in this action. The reason is, that as soon as the defendant claimed property, the *withernam* beasts were detained unjustly by the plaintiff, and the subsequent verdict, though found for the plaintiff, did not make the detainer, which was in itself unlawful, lawful *ex post facto*; for the plaintiff could not detain beasts *in withernam*, when the defendant claimed the thing replevied as his own property, and not as a distress. The *withernam* proceeds on the supposition that the original taking was a distress, and if the first beasts had been the defendant's, they ought not to have been removed out of his possession, much less ought other beasts to have been taken *in withernam*.

35 H. 6. 47.

Per Danby and Moyle, the defendant shall recover damages in *withernam*, on an *elongata* returned on a writ *de retorno habendo*; because, if the *retorno habendo* be entirely to right the defendant, damages must be recoverable in case the beasts be eloigned. Others were of a different opinion; and held that it is only a judicial writ to cause the beasts to be returned.—But the better opinion is, that he shall have DAMAGES; because by the eloignment he is deprived of the benefit and use of the beasts, which he ought to have been immediately put in possession of, in pursuance of the judgment.

Dyer 41.

Dyer ib.

If the plaintiff be nonsuit, he may have a second deliverance presently, and this shall be a *superfedeas* to the *retorno habendo*. And if the *retorno habendo* be sued after the
second

second Deliverance granted, the sheriff ought to execute the second deliverance. And this prevents the mischief of the *withernam* against the plaintiff.

A. brings replevin against *B.* and has deliverance, and after is nonsuit, and a return is awarded to *B.* And upon this, an *elongata* being returned, *B.* has the beasts of *A.* in *withernam*.—In this case, if the plaintiff was first in the county court, and removed into *C.* *B.* the second deliverance must not be sued of the beasts delivered in *withernam*, but of the beasts first taken; and the defendant shall be put to gage deliverance of the *withernam*, (*quod nota*); and yet the plaintiff himself is possessed of the beasts for the taking of which he complains; and if he makes his plaint or count, of the beasts delivered in *withernam*, it is not good. The reason is before given, for the second deliverance is a judicial writ appointed by statute, and therefore must in all points pursue the record out of which it issues. And the plaintiff cannot declare on the *withernam*, for this is the award of the court upon his eloigning the cattle; and if he is injured by the return of the sheriff, he has his action against him.

If the *withernam* be awarded against the defendant, on behalf of the plaintiff, on *mesne* process, the sheriff may take the beasts of the defendant to any value, as a pain to make him appear. And when the defendant comes in, he will be fined in court, and committed till he has paid that fine, and gaged deliverance of the beasts; and then he can have his own goods restored

H

that

F. N. B. 74.

A. Note.

25 Ed. 3. 90.

pl. 38.

33 Ed. 3.

Avowry 256.

13 Ed. 3. Re-

plevin 37.

Dyer 59. Post

Westm. 1. c.

17.

Offic. Brev.

tit. Wither-

nam.

that were taken *in withernam*, and interplead with the plaintiff. And here he cannot plead that either he did not eloign, or that the beasts were dead in pound; for that is contrary to the *elongata* returned by the sheriff, and not to be denied; but if it be false, he has remedy against the sheriff for his false return.

Lt. Raym.
613. Salk.
581. S. C.

[But the defendant, as appears before, may plead *non cepit*, after the return of *elongata*; and the reason is, because the sheriff must either return *deliberari feci, elongata*, or that no person came to shew him the cattle; but he cannot return that they were not taken, for that goes to the point of the writ, which the defendant is to falsify, and not the sheriff. The sheriff must necessarily return *elongata* where he cannot make deliverance; and therefore it should seem, that no action lies against the sheriff for such return, as being false. And for the same reason, because the return of *elongata* was unavoidable, it shall not conclude the defendant from pleading *non cepit*.]

9 H. 6. 42.

If on the *withernam* awarded against the defendant, *nulla bona* be returned, a *capias* issues against the defendant, and on that *capias* if the defendant be taken, he shall be in custody until he has paid the fine, and likewise gaged deliverance; and if he be not taken, they proceed to process of outlawry.

V. Of the writ *de proprietate probandâ*.

Reg. 83, &c.
Brev. Jud.
135.

If the replevin be either by plaint or by writ, and the defendant claims property, the sheriff's power to replevy the beasts is
at

at a stop; because, the defendant claiming Co. Lit. 145 the beasts as his own, the sheriff cannot redeliver that property to the plaintiff which is claimed by the defendant; and therefore, if the replevin be by plaint, the jurisdiction is at an end by such claim, till the plaintiff purchases the writ *de proprietate probandâ*; because no controversy of property can be determined in the county court without the king's writ.

On the purchasing of this writ an inquest Dalt. Sher. of office is holden; and if on such inquest 435. the property be found for the plaintiff, the sheriff is to make deliverance; but the defendant may remove it by *recordari*, and put in his plea of property above, and it shall be determined by a verdict. But if the inquest of office find for the defendant, there is an end of the replevin by plaint, because the property is found for the defendant, and so no redeliverance can be made by the sheriff. But the plaintiff may bring a new replevin by writ, for what is done on the plaint is no bar, nor has it any concern with the proceeding upon the writ.

If the replevin were by original writ, and the defendant claims property, the sheriff cannot make deliverance any more than he could upon the plaint, and therefore the sheriff in such case returns such claim of property on the *causam nobis significes* (on the *alias* or *pluries* replevin,) as a cause why he cannot execute the writ; and on this return of the sheriff, the writ *de proprietate probanda* issues, that the plaintiff may not want his beasts in the mean time;

H 2

and,

and, if the property be found for the plaintiff, orders a redeliverance to the plaintiff, and gives the defendant a day in court. And the plaintiff may not only declare on the unjust caption, but on the subsequent injustice of the defendant, in claiming the goods as his own; and here the defendant may likewise set up his claim of property, and try it by verdict, where the matter will be determined under peril of an attain. — But if this claim be found against the defendant on the inquest of office below, he is subject to a fine for his false claim of property, whereby he has stopped the course of replevin by hindrance of the deliverance of the goods, which is a contempt of the court, and subjects him to a fine; as likewise to damages to the party, who wants his goods in the mean time. The defendant must appear in proper person to answer his fine to the king, but after payment of the fine he may appear by attorney; but until payment of the fine, he must plead in person.

Brev. Jud.
135. &c.
Fitz. abr. tit.
Propr. prob.
pl. 5.

But if the verdict be found for the defendant in the writ *de proprietate probandâ*, there is an end of the replevin, as well by writ as by plaint; for the sheriff is not by the writ *de proprietate probandâ* to deliver the goods to the plaintiff, unless the jury find them to be the plaintiff's. And if the defendant has the goods and possesses them as his own, they cannot proceed in an action, which supposes the goods to be re-delivered to the plaintiff. But if the plaintiff has any right to them, since the possession by the inquest is established on the side of the defendant, the plaintiff cannot

not get back his possession of the goods, until he has established his right in an action of law for the same; and therefore he may bring his action of detinue, trover, or trespass, for recovering the goods, but cannot continue his action, whereby the possession should be delivered to him.

A bailiff cannot claim property BELOW Co. Lit. 145. when the sheriff comes to make replevin; 11 H. 4. 4. because being only servant to another, in whose right he has taken the goods, he cannot say they are his own, and therefore cannot hinder the sheriff from delivering the goods according to the command of the writ, as the proprietor might. — For though Bro. Jud. 137. Thes. Brev. 170. a man by claiming property may prevent his own goods being delivered, yet he cannot hinder other people's goods, because the sheriff cannot hear any stranger interpose against his obeying the king's writ. But the owner himself shews a just cause why the goods should not be delivered until further enquiry. Yet the bailiff ABOVE 1 Lev. 90. may plead property in a stranger; for this is a sufficient reason to excuse him from damages, since he has not taken the plaintiff's goods from him.

VI. Of the process for removing the cause out of the inferior court.

Since the replevin is *vicontiel*, and determinable in the inferior court, where the suitors are judges both of the law and the fact;—and since the suitors are not awed by the peril of an attainr, nor the matter of law determined without danger of false judgment, from their ignorance or partiality;—

tiality;—the law hath appointed two writs to remove such causes out of inferior courts into the superior, and those are the *pone* and *recordari*.

a Inst. 339.

The *pone* is when the proceeding is by writ of replevin; for when a writ of replevin issues, and it is returned out of the county court, THAT gives the judges above authority to proceed thereon, whether the proceeding below be recorded or not: for the judges want no record from below when they have the king's writ with them.

But the *recordari* is to record the proceedings, and, when recorded, to return them into the king's bench or common pleas. So that it gives authority to record those proceedings that were not of record before; therefore, if the replevin were by plaint, it must be removed by *recordare*, because the courts must have their authority by proceedings returned of record.

We shall consider each of them separately.

I. Of the *pone*.

F. N. B.
69. M.

If the replevin be removed out of the county court into the common pleas, the writ of *pone* shall be as follows:

"*Rex vic' Linc' salutem. Pone, ad petitionem petentis, coram justiciariis nostris apud Westm. (tali die) loquelam quæ est in com' tuo per breve nostrum, inter A. & B. de averiis ipsius A. captis & injuste detentis, ut dicitur, & summoneas per bonos summonitores præd. B. quod tunc sit ibi, præfato A. inde responsurus, & habeas ibi summonitores & hoc breve.*"—

"George the third, &c. To the sheriff of,
&c.

&c. greeting: At the petition of the plaintiff, put before our justices at Westminster (such a day) the plaint which is in your county by our writ between *A.* and *B.* of the beasts of said *A.* taken and unjustly detained, as is said, and summon by good summoners the aforesaid *B.* that he be then there to answer the aforesaid *A.* hereof, and have there the summoners and this writ."

And if it be removed into the king's bench, then the writ is such:

"*Rex, &c. Pone, ad petitionem petentis, coram nobis ubicunque tunc fuerimus in Angliâ, loquelam, &c.*"—"George the third, &c. At the petition of the plaintiff, put before us wheresoever we shall then be in England, the plaint, &c."

The reason why the defendant is summoned in this writ is, that he being already *attached* in the court below, and having appeared, it is presumed he would have come in upon the summons; and when he hath appeared below to avow his distress, it is not to be supposed that the caption is an unlawful caption, on which he should be attached; and therefore, when the plea is removed, the entry is, *quod defendens summonitus fuit ad respondendum.*

The plaintiff may remove the plea out of the county court, either by *pone* or *recordari*, without cause shewn, for it is his own delay; but the defendant cannot remove it without cause shewn; for, since it is in delay of the plaintiff, a just cause ought to appear upon record for such removal.

F. N. B. 69.

M. 70. B.

Reg. 84.

F.N.B. 70.A.

2 Inst. 339.

There are several causes of removal at common law; as if either party were related to the lord or sheriff, &c. But the stat. of *West. 2. c. 2.* hath added one cause, and that is, if the defendant distrain for customs and services, and the plaintiff pretend to be out of his fee; for by this means the plaintiff recovered his beasts, and drove the lord to his writ of customs and services, whereby the lords were often dispossessed of their distresses; and therefore this statute provided that such defendant should, upon such pretence of the plaintiff, remove the plea into the superior courts, and try the tenure in this action.

F.N.B. 70.A.

And the cause of removal is inserted in the writ, after the *teste* thereof, in this manner:

“*Quia C. clericus D. vicecomitis prædicti qui frequenter in absentia vicecomitis illius tenet placita ejusdem comitatus, est consanguineus prædicto A. propter quod idem vicecomes favet ipsi A. in loquelâ prædictâ, ut dicitur, fiat executio istius brevis, si causa sit vera et præd' B. petit, et aliter non.*”—“Because C. clerk of D. the sheriff aforesaid, who frequently in the absence of that sheriff holds pleas of the same county, is akin to the aforesaid A. wherefore the same sheriff favours the aforesaid A. in the plaint aforesaid, as is said, let this writ be executed if the cause be true, and the aforesaid B. requires it, and otherwise not.”

Or thus: “*Quia præd' B. cepit averia præd. in feodo suo pro consuetudinibus et servitiis sibi debitis, ut dicitur, fiat executio, &c. (ut superius)*”—“Because the aforesaid B. took the
beasts

beasts aforesaid in his fee for customs and services due to him, as is said, let execution, &c. as above."

Or thus: "*Quia præd' B. clamat præd' A. esse nativum suum, et eâ occasione asserit averia præd' esse sua propria, propter quod loquela illa in comitatu deduci non debet, ut dicitur, fiat executio, &c. (ut supra.)*"—"Because the aforesaid *B.* claims the aforesaid *A.* to be his villain, and upon that account asserts the beasts aforesaid to be his own, wherefore that plaint ought not to be carried on in the county, as is said, let execution, &c. as above."

And the sheriff cannot return that the cause is not true.—But notwithstanding the said causes, the defendant may avow for *damage feasant*; for the cause of removal is no material part of the writ, nor is it traversable, and therefore the defendant may justify the taking and detention of the distress in any other manner.

But if either plaintiff or defendant remove the suit out of the LORD'S COURT, they ought to shew cause, because they should not oust the lord's court of the profits of such jurisdiction, without apparent reason.

And it seems that such causes used anciently to be examined, before such writs were granted. So in chancery they used to examine the cause of action before the granting of original writs; but this in both cases is now neglected, and such writs issue of course.

And the cause of removal out of the lord's court shall be shewn in this manner: F.N.B. 70. A. Reg 84. b.

" *Quia*

“ *Quia prædictus abbas est dominus curiæ de C. in quâ loquela illa pendet per retornum brevis nostri, propter quod idem A. in loquela præd’ in eadem curiâ justitiam consequi non potest, ut dicitur, fiat executio, &c.* ” — “ Because the aforesaid abbot is lord of the court of C. in which that plaint hangs by the return of our writ, wherefore the same A. cannot obtain justice in the plaint aforesaid in the same court, as is said, let execution, &c.”

Or thus: “ *Quia J. Ballivus K. archiepiscopi Cantuar’ curiæ suæ de N. coram quo loquela illa pendet, per retornum brevis nostri in eadem curia implacitatur per præd. B. de quodam debito 20 marcarum, coram præf. justiciariis nostris per breve nostrum, propter quod idem ballivus in odium ipsius B. favet ipsi A. in loquela suâ præd’, ut dicitur, fiat executio, &c.* ” — “ Because J. bailiff of K. archbishop of Canterbury, of his court of N. before whom that plaint hangs, by the return of our writ in the same, is impleaded by the aforesaid B. of a certain debt of 20 marks, before our justices aforesaid by our writ, by reason whereof the same bailiff out of hatred to the said B. favours the said A. in his aforesaid plaint, as is said, let execution, &c.”

The former conclusion is proper when the plea is removed at the suit of the plaintiff; but the latter when it is removed at the suit of the defendant.

21 H. 6. 50.
F. N. B. 70. A.
Note.

If the plaint be removed by the defendant by *pone*, the plaintiff shall be demanded at the day in bank, under the peril of a nonsuit, and if he make default, a return shall

shall be awarded and no process; but if the plaintiff appear, and the defendant make default, a *distringas* shall issue, and on *nulla bona* returned, then a *capias* and process of outlawry. So if the plaint be removed by *pone* or *recordari* by the plaintiff, there if he make default he shall be nonsuit; and if the defendant make default, then shall issue a *pone per vadios*, and so process of outlawry.

By this it appears that whenever the defendant hath day in court by the writ, there the plaintiff is demandable under peril of a nonsuit; and the reason is, that when the plaintiff brings in the defendant, he ought to attend himself; and when the defendant is brought into the court below, and removes the plea into the court above, he thereby gives himself and the plaintiff a day in the court above, and the plaintiff, having put in pledges of prosecution, ought to follow the writ; so that wherever day is given, there the defendant may demand the plaintiff, under peril of a nonsuit. But where day is given to the defendant by the writ, there no judgment can be given against him till he appears, for that would be to give judgment *parte inauditâ*; and therefore though he himself removes the plaint by *recordari*, whereby he gives himself a day in the superior court, yet if he do not appear at the day, they must carry on the process to make him appear, though he has appeared in the court below, since such appearance does not give authority to the court above to proceed, unless he has first appeared there. But there is judgment

ment of nonsuit against the plaintiff if he does not appear, for his non-appearance is not prosecuting his plaint, which is a nonsuit.

3 H. 6. 2.
F.N.B.69.M.
Note.

12 H. 4. 14.
3 H. 6. 2.
4 Inst. 266.

Pone (at the suit of the defendant) *loquellam quæ est in comitatu tuo, inter A. & B. de averiis ipsius A. captis, &c.* and says, *præfato B.* where it should be *præfato A.* The plaintiff's council prayed damages, for that otherwise the plaintiff had no remedy; for the *pone* is abated, and so the court is without warrant: yet it shall not be remanded, for the county court and the courts above are the courts of the king; and a new *pone* doth not lie, because the plaint is here. On the other hand it was said, that a *pone* or *recordari* is but to remove the plaint, so that when the plaint is removed, the *pone* or *recordari* shall never abate, for that the court is possessed of the plaint; but yet the plaintiff hath not a day in court, because such writ, not being good, cannot give the plaintiff or defendant a day; therefore the court may make a special writ to the sheriff to warn the plaintiff to pursue the plaint; and so it was done in this case.

F.N.B.69.M
Note.

1 R. 3. 4.
7 E. 4. 23.

6 E. 3. 55.
8 E. 3. 71.
Cro. El. 543.
Moor 30.
contra.

The plaint is well removed, although the *pone* bear date before the plaint entered. So if the plaint be removed by *certiorari*, where it ought to be by *pone* or *recordari*. So if one plaint be removed where another ought to have been. Or where there is a variance between the plaint and the writ.

II. Of the writ of *recordari*.

F.N.B.70.B.

When the plaint is in the county, and the replevin sued there without writ, then
if

if the plaintiff or defendant will remove it, he ought to sue a writ of *recordari*, out of the chancery, directed unto the sheriff; and the writ shall be such:

“*Rex vic' Linc' salutem. Præcipimus tibi, quod in pleno com' tuo recordari facias loquelam, quæ est in eodem com' sine brevi nostro, inter A. & B. de averiis ipsius A. captis & injuste detentis, ut dicitur, & recordum illud habeas coram justiciariis nostris apud West.' (tali die) &c. sub sigillo tuo & sigillis quatuor legalium militum ejusd' com' ex illis qui record. ill. interfuerunt; & partibus eundem diem prefigas, quod tunc sint ibi, in loquelâ illâ, prout justum fuerit processuri; & habeas ibi nomina præd' quatuor militum, & hoc breve. Teste, &c. Fiat executio istius brevis, si præd. A. hoc petat, & aliter non.*”—“George the third, &c. To the sheriff of, &c. greeting: We command you that you cause to be recorded in your full county the plaint which is in the same county, without our writ, between *A.* and *B.* of the beasts of the said *A.* taken and unjustly detained, as is said, and have that record before our justices at *Westminster* (such a day, &c.) under your seal and the seals of four lawful knights of the same county of those who were present at the recording it, and prefix the same day to the parties that they be then there, to proceed in that plaint according to justice, and have there the names of the said four knights and this writ. Witness, &c. Let this writ be executed if the aforesaid *A.* requires it, and otherwise not.”

The

38 Ed. 3. 31. The words *ut dicitur* are only inserted when the writ is brought by a common person, and not when it is brought by the king.

F.N.B. 70. B. And by this writ it appeareth that the plaintiff may remove the plaint by *recordari*, without any cause put in the writ; but the defendant cannot remove the plaint without shewing cause in the writ, as is before said upon the *pone*. And the causes for the defendant ought to be such.

“*Quia præd’ B. placitando in com’ præd. asserit se averia præd’ cepisse in separali solo suo, ut in damno suo ibidem, in quo quidem solo præd’ A. clamat communiam pasturæ, ut dicitur; quæ quidem loquela, eo quod tangit liberum tenementum (ut prædictum est) in eodem com’ secundum legem & consuetudinem regni nostri sine brevi nostro placitari non debet. Fiat executio istius brevis (si causa sit vera) & præd. B. hoc petat, & aliter non.*”

—Because the aforesaid *B.* in pleading in the county aforesaid, asserts that he took in his separate soil the beasts aforesaid, as in his damage there, in which soil the aforesaid *A.* claims common of pasture, as is said, which plaint inasmuch as it concerns the freehold (as is aforesaid) should not be pleaded in the same county, according to the law and custom of our realm, without our writ. Let this writ be executed (if the cause be true) and the aforesaid *B.* requires it, and otherwise not.”

12 H. 4. 17. If the plea be removed out of the court
Mich. 50 Ed. of the lord, (in ancient demesne, *ut vide-*
3. 12. *tur*) the cause is traversable; *contra*, if out
Finz. *atr. tit.* of

of the court of the king. And if the cause be insufficient, or none at all, yet the parol shall not be remanded; otherwise if in ancient demesne; for, upon a *recordari* out of ancient demesne, the plea is wholly upon the cause, and therefore the plaintiff may be nonsuit in such *recordari*; but if it be out of any other court, the plea is upon the mere matter, and therefore the plaintiff cannot be nonsuit upon the *recordari*, but it must be in the action; the reason is, because ancient demesne is a privilege going with the soil (such manors being anciently composed of the king's husbandmen), and the pleas cannot thence be removed without cause, because it would alter the condition of the soil, to be impleaded in the king's courts, without such real cause made out.

Cause de remover plea,
pl. 10. F. N.
B. 70. B.
Note.

Beasts were taken in *D.* in the county of *Wilts*, (which was within the precincts of the honour of *Wallingford* in the county of *Berks*,) and were driven into the county of *Berks*, (where the castle and court of the honour of *Wallingford* was) and there the plaintiff had deliverance without writ; the defendant sued a *recordari* to the sheriff of *Berks*, *quia distrixit in feodo*, and the plaintiff came, but the defendant made default; and it was adjudged: 1. That the parol was well removed, notwithstanding the taking was in another county. 2. That process of outlawry did not lie here without a default of the defendant, as it does in replevin. 3. That yet if he came in by process of outlawry, he should be put to answer. 4. That he might avow *damage feasant*,

20 Ed. 3. 21.
Dyer 168.

sant, notwithstanding this special cause assigned.

F.N.B. 70.B.

And if a replevin be sued by plaint, in the court of any other lord, than in the county court before the sheriff, then the *recordari*, which is sued by the plaintiff or defendant, shall be directed unto the sheriff; and the writ shall be thus :

“ *Rex vic’ Linc’ salutem. Præcipimus tibi quod assumptis tecum quatuor discretis & legalibus militibus de com’ tuo in propriâ personâ tuâ accedas ad curiam W. de C. & in illâ plenâ curiâ recordari facias loquelam quæ est in eâdem curiâ sine brevi nostro &c. & recordum illud habeas sub sigillo tuo & sigillis quatuor legalium hominum ejusdem curiæ qui record. ill. interfuerint, & partibus, &c. (ut supra) quia præd. A. est ballivus præd. W. de C. curiæ suæ præd. & tenet placita ejusdem curiæ, & judex in suâ causâ esse non debet.*”—“ George the third, &c. To the sheriff of, &c. greeting: We command you that you take with you four discreet and lawful knights of your county, and go in your own proper person to the court of *W. of C.* and in that full court cause to be recorded the plaint which is in the same court, without our writ, &c. and have that record under your seal and the seals of four lawful men of the same court, who were present at the recording it, and to the parties, &c. (as above) because the aforesaid *A.* is bailiff of the aforesaid *W. of C.* of his court aforesaid, and holds the pleas of the same court, and ought not to be judge in his own cause.”

[Note,

[Note, this writ is sometimes called a *recordari facias loquelam*, and sometimes an *accedas ad curiam*.]

If the plea be discontinued in the county, F.N.B. 71. a. yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench by *recordari*, and it shall be good, and the plaintiff shall declare upon the same; and the court shall hold plea upon the same plaint: and therefore if the defendant be without addition in the plaint, he shall not have addition in the *recordari*, although process of outlawry lie thereon. For the plea is not held on a writ, but a plaint only, and so not within the intent of the stat. of 1 H. 5. c. 5. which speaks only of writs original, &c.

2 H. 5. 6.

3 H. 6. 30.

F. N. B. 71.

A. Note.

And if the plaint be continued, and issue joined, in the county court, yet nothing shall be removed but the plaint; and therefore in the court above, the plaintiff is to declare *de novo*. The reason is, that the *pone* and *recordari* give the defendant a day in the court above; and when at common law the plaintiff and defendant appeared at the day, the plaintiff counted and declared, and the defendant avowed *ore tenus*, that the court might know the cause of complaint; and being in a new court, it was all to be rehearsed, in order that they might understand it. And this the rather, because, being a superior court, they were not bound by any decision made on the proceedings below. This could be no inconvenience in replevin at common law, where the plaintiff might bring his replevin *toties quoties*; and where when the defendant removed it,

I

and

and gave another day, it was upon cause shewn of inability or partiality in the courts below.

[But yet, to some purposes, the court are made judges of the whole proceedings, on the removal of the plaint by *recordari*; and therefore, if a *witbernem* be awarded in the court below, the plaintiff shall gage deliverance in the court above. 21 H. 6. 40.]

And not only on a *pone* or *recordari* is the court to take no notice of any pleadings or proceedings but what are rehearsed or recorded before them; but even on a *habeas corpus*, which is a writ of liberty, the plaintiff must follow the body of the prisoner, and declare against him *de novo*; for the court cannot take notice of the pleadings rehearsed before inferior judges, which do not come up before them, but by writ of false judgment, where the court is not of record;—or by writ of error, where it is;—and therefore they have nothing to do with their proceedings until judgment is given.

But where they have the body of the defendant, the plaintiff may proceed originally against him. So in *pone*, where they have the original writ, they may proceed originally upon it. And the *recordari* makes the plaint of record; for the statute of *Marlbr'* which gives the plaint provides, in the first chapter, that all complaints of distresses shall come into the courts of the king; which gives the king's courts authority to record such plaint as was in the county. The words are, *Et praterca, quidam*

*dam eorum se per ministros domini regis iusticiari non permittant, nec sustineant quod per ipsos liberenter districtiones, quas auctoritate propria fecerint ad voluntatem suam; provi-
sum est, concordatum & concessum quod tam majores quam minores justiciam habeant & recipiant in curia domini regis, & nullus de cetero ultiones aut districtiones faciat per voluntatem suam absq; consideratione curiæ domini, si forte damnum vel injuria sibi fiat unde amendas habere voluerit de aliquo vicino suo, siue majore siue minore.*

By this statute it appears, that the plaint, though given for expedition before the sheriff, may at any time be removed and recorded in the court of the king. [It has even been adjudged, that the delivery of a *recordari* to the clerk of a county court, after an interlocutory and before final judgment, is a stay of all further proceedings in that court. 2 Bur. 1151.

And when the plaint is removed by *recordari*, the court above will award a *capias* on the defendant's default, though no such process could have issued in the court below. 3 H. 6. 55. But it is otherwise of a *justicies*, for on that no *capias* lies, even in the court above. 4 Inst. 266.]

In a *recordari* to remove a record out of ^{36 H. 6.} ancient demesne, the writ shall say *loquelam* ^{F.N.B.70.B.} *et processum*, and not *recordum*; yet the form of the register in the *recordari*, as before said, is *et recordum illud habeas*.

In the sheriff or lord's court, and in ancient demesne, in all replevins, the plaint is called *loquela*, because it is not a record, as it is in their court; but in the *accedas ad*
I 2 *curiam*,

curiam, the transmission of the plaint by the king's writ, under the seals of four of the suitors, in the presence of the sheriff and four knights, is called a *record*, because it is sent to be a record in the courts above.

9 H. 6. 58.

34 H. 6. 42.

contra.

F.N.B. 71.C.

Where by *recordari* the record was removed by the sheriff out of the court of chancery at *Canterbury*, it was said, that the court of *Canterbury* might have refused to obey the writ; for being a court of record by commission, the plea ought not to be removed by *recordari*, but by *habeas corpus cum causâ*, or *certiorari*. And it was held, that inasmuch as the plea was come hither without warrant, all was void, and that therefore the court could not remand it, for the record remained at *Canterbury*; and if no proceeding there according to the suit of that court, it was discontinued.

Reg. 6, 7.

Yet in the register there is a *recordari* on a foreign voucher out of *Chester*.

The reason is, because the *recordari* is to return a *loquela*, and when the proceedings are in a court of record, it is not a *loquela*, but a RECORD in its own nature in the court below. — Again, the *recordari* supposes a partiality in the court below, which cannot be supposed in a court of record, acting under the king's commission. Nor have the superior courts any inherent right, to judge of what any other inferior court of the king is possessed of, until it comes before them by *habeas corpus cum causâ*, or by *certiorari*.

The *habeas corpus* is the WRIT OF LIBERTY; and the law hath that tenderness for the liberty of a man, that when any person is

is imprisoned, he may purchase that writ to any superior court; and if any of these courts see cause on the return to discharge him, he shall be freed. Hence it is, that the body must be sent, and the cause of imprisonment must be sent with it.

A *certiorari* is to return the proceedings on another ground. All inferior courts are of definite and bounded authority, and cannot award execution out of the district; therefore, lest justice should fail, process of *certiorari* goes to remove the record into the upper courts. And both these ways have been used to give jurisdiction to the upper courts.

The *certiorari* coming to remove a record on supposition that inferior jurisdictions may exceed their bounds, they must send the record in the condition it was when the *certiorari* came to them; but it stops their proceedings, from the time they receive it.

If a record be removed out of a court of record by *recordari*, it cometh in without warrant, and the court shall not hold plea thereof. But if a record cometh in court without a warrant, the party may sue a writ directed unto the justices, that they may proceed upon that record *quod coram vobis residet*. F.N.B.71.C.

The meaning of the distinction is this, that when a *recordari* is sent down to a court of record to remove a replevin there depending, they may proceed and not obey the writ; because that replevin is of record in the king's court, and consequently in *curia regia* according to the statute: and therefore the writ to make it a record is

actum agere. But if they do obey the writ, and send the record, they cannot afterwards proceed upon it, because they have sent it away from them: and the court above cannot proceed upon records of another court, as they do in replevin on the plaint sent before them by *recordari*; and therefore there must be a writ to give them authority to proceed on the record *quod coram vobis residet*. But they have an inherent authority to see that other jurisdictions do not exceed their limits; and therefore, when they send a *certiorari* to remove such record, they ought to proceed above on the plaint entered in the county. [If the *recordari facias* bear date before the plaint was entered in the county,] yet the record is well removed, because both courts are the courts of the king. But if the record be removed out of the court of any other lord by such writ, which beareth date before the plaint, it is not good. The reason is, because the sheriff's county being held or farmed from the king, as immediate deputy, the king may remove the replevin out of the sheriff's court into his own, without any cause shewn; and therefore it is not material whether the *recordari* be tested before the plaint or not: and although the defendant cannot remove the plaint without cause, yet this is not to prevent the sheriff from being ousted of his jurisdiction, but that the plaintiff may not be delayed without good cause shewn.— But where the record is removed out of the lord's court, which has a jurisdiction by grant or prescription, there must be cause shewn for such removal; and such

such cause will be absurd if the *accedas ad curiam* bears date before the plaint; for that cannot be a cause to oust the lord of jurisdiction, which was not in being at the time of the writ issuing.

VII. Of *replevin* itself, and herein are to be considered,

1. For whom, and in what cases it lies.
2. The declaration in *replevin*.
3. The several pleas in this action; and herein of the avowry.
4. Of the judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and of the writ of second deliverance.

1. For whom and in what cases it lies.

The *replevin* lies as well for goods in which I have only a qualified property, as for those in which I have the absolute property. As if goods be in my hands, in order to be delivered over to *J. S.*—and *J. N.* takes them from me, I may have a *replevin* against *J. N.* to bring back these goods into my own possession; because I have a right to the possession of these against every body but *J. S.* and therefore as *J. N.* is a trespasser for violating that possession, so I may qualify that tort he hath done, by bringing the *replevin* which complains of the unjust taking, and that *J. N.* detains them *contra vadios & plegios*.

So it is if cattle be farmed to me to manure my land; if they be taken out of my custody, I may bring *replevin* for them; because during the term I ought to have the use of them: and therefore the caption and detention of them, by any person, is unlawful,

Bro. Abr. tit.
Repl. pl. 29.
2 Ro. Abr.
430.
Bro. tit. Repl.
pl. 8.
Doct. Plac.
314.

lawful, which is the injury complained of in the replevin; or I may have in this case a special replevin, setting forth my special property.

2 Ro. Abr.
431.

If *A.* takes my goods by the command of *B.* I may take the replevin against both; because in trespass both are principals, and equally guilty of the unjust caption and unjust detention.

2 Ro. Abr.
430.
1 H. 4. 18.
Bro. Abr. tit.
Replev. pl.
14. 54.
9 Co. 22. b.
23. a.

If the lord distrains the beasts of the tenant, and the mesne puts his own beasts in the pound in lieu of the tenant's, the mesne may afterwards have a replevin for his own beasts, and the lord cannot plead that the beasts of the tenant, and not of the mesne, who is the plaintiff in replevin, were taken:—because, the tenant having paid his rent to the mesne, the mesne is thereby obliged to defend the tenant from the lord's distress. But this cannot be done unless the mesne becomes party to the suit, and be substituted in the place of the tenant.

By this means, the mesne may shew the services performed to the lord, for which the distress was taken; and consequently that the tenant ought not to be disturbed. Hence it is, that the writ of mesne is allowed to the tenant, to bring in the mesne if he does not come in of himself; because the tenant being a stranger to the transactions between the lord and the mesne, he cannot defend himself against the lord but by the mesne; and therefore, where the mesne is to take the defence, it is but fit he should be allowed to pledge his own cattle, and discharge his tenants. And the lord hath no prejudice, because there is still
a good

a good pledge to answer his services if there be any due. So and for the same reason it is, if my lessor distrains my tenant, I may put my beasts in the pound in lieu of my tenant's, and then replevy them, as if they had been originally taken.

Several persons cannot join in one replevin for several chattels, where the property of them is several; because, where several distresses are taken by the same person of different men, each hath a several and particular injury done him, if the distresses be unlawful; and therefore they cannot jointly complain of an unjust caption and detention, where the property is several. For what reason have I to complain, or to seek redress in my own name, for an injury supposed to be done to another?

If beasts which are *feræ naturæ* be reclaimed by me, and are restrained or taken out of my custody, I may have a replevin for them; because I have a property in them while they continue with me. But this property only remains while they are in my possession, or retain the *animus revertendi*; and therefore if they leave me of themselves, and another takes them while they are out of my possession, and they have not the *animus revertendi*, I cannot have a replevin for them; because, in such case, I have no property in them.

If a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, and execute it, the court of justice would commit them for a contempt

3 H. 4. 16.
Bro. Abr. tit.
Repl. pl. 12.
Doct. Plac.
315.
Co. Lit. 145.

2 Ro. Abr.
430.
Bro. Abr. tit.
Repl. pl. 64.
Doct. Plac.
314.

Lev. Ent. 152.
Lutw. 1191.
Rast. Entr.
275.
Bro. Abr. tit.
Repl. pl. 22.

contempt of their jurisdiction, because by every execution the goods are in the custody of the law ; and the law ought to guard them : and it would be troubling the execution awarded, if the party on whom the money was to be levied, should fetch back the goods by a replevin. And therefore they construe such endeavours, to be a contempt of their jurisdiction, and upon that account commit the offender. But if any INFERIOR jurisdiction issues an execution, a replevin will lie for the goods taken by that execution ; because the inferior jurisdiction being restrained within particular limits, the officer who took the goods, is obliged to shew that he took the goods within those limits, and that the inferior court which issued the execution did not exceed their authority in issuing it. Besides, an inferior court of record cannot commit for contempt out of the court. Hence it is, that the officer of an inferior court, is to shew by what authority he took the goods. Thus, in a replevin, the defendant was put to justify, by a condemnation before a justice of peace, for not entering strong waters, and a warrant on that for levying 20 s. fine on the plaintiff. [But, in a subsequent case, the court granted an attachment against the undersheriff, for granting a replevin of goods, distrained on a conviction for dear stealing. Str. 1184.]

3 Lev. 204.
Aylesbury v.
Harvy.

3 H. 7. 1.
Bro. Abr. tit.
Repl. pl. 33.
Vide ibid. pl.
51. contr.

A replevin doth not lie against the king, nor where the king is party, nor where the taking is in right of the king ; and if such replevin should be granted, the sheriff ought to forbear to execute it, when he is informed

informed the king is party; because all the king's debts are of record,—he taking nothing but by matter of record: and therefore the cattle are seized for the king's debts by the *levari facias*, which is a writ of execution, and consequently no replevin lies against the king, any more than it does for goods taken in execution at the suit of common persons.

Executors shall have replevin for the goods of the testator taken in his life time, because the general property is in the executors, and the possession ought to follow that; and therefore the executor may recover the possession by this writ of replevin.

Bro. Abr. tit.
Repl. pl. 56.
Sid. 80.
Arundel v.
Trevyl.
Raft. Ent.
560, 561.
F.N.B.69.K.

If the goods of a feme sole be taken and she marries, the husband alone may sue the replevin, because the property is transferred by the marriage, and vested absolutely in the husband, so that he may release it; and consequently he may have an action in his own name to bring back the property.

In replevin for a sow and pigs, the defendant, as to the sow avows *damage feasant*, and for the pigs pleads *non cepit*. The jury found for the defendant, as to the sow; and for the pigs, they found that the sow farrowed them after she was distrained, and in the possession of the defendant. The plaintiff had damages for the pigs on this plea of *non cepit*; because the pigs were taken by the defendant as well as the sow, though they were not *damage feasant*; and therefore the defendant should have set forth the special matter as to the pigs.

Bro. Abr. tit.
Repl. pl. 41.
Sid. 82.

No

Bro. Abr. tit. No replevin lies for charters relating to
 Repl. pl. 34. the inheritance, because the charters are
 reckoned part thereof, and as such descend
 with it to the heir; and not being esteemed
 in law chattels, are not by law replevifable.

2 Show. 91. A replevin doth not lie for goods taken
 Nightingale in foreign parts, though afterwards brought
 v. Adams. into the realm; because such a foreign cap-
 tion might have been justifiable according
 to the law and custom of the place where
 it was made, though it may be illegal by
 our law: and therefore such caption ought
 not to be tried here.

F.N.B. 69. I. If beasts be taken in one county and
 Doct. Plac. carried into another, the plaintiff may have
 315. his replevin in either county; because it
 is a caption in every county where they are
 taken by the defendant.

Regr. 81. b. This writ of replevin is always executed
 Bro. Abr. tit. by the sheriff, even in his own case, where
 Repl. pl. 65. he distrains the goods of another, because
 this writ is a *justicies* to the sheriff, on which
 he is to hold plea in his county court; and
 therefore no other can intermeddle in the
 execution thereof but the sheriff, who is to
 preside over the suitors, as judge therein.

2. Of the declaration in replevin.

Hob. 16. And this is little more than a transcript
 Moor 678. or recital of the writ itself. But in the de-
 2 Mod. 199. claration you must not only alledge that
 Doct. Plac. the defendant took the beasts at such a
 315. place, but also you must alledge the *locus*
 Bro. Abr. tit. *in quo*, as *in quodam loco ibidem vocato*, &c.
 Repl. pl. 47. for it is not enough to alledge such a place
 2 H. 6. 14. from whence the *venue* may come; but the
 Cro. Eliz. place must be so PARTICULARLY specified,
 896. as to give the avowant an opportunity to
 Wardv. Savil. shew

shew that he had a right to take the goods, in that PARTICULAR place; because the right of the caption may turn on the place; and in this action the freehold may come in dispute. And therefore it is necessary to specify the place particularly, wherein the beasts were taken, which is equivalent to the new assignment in trespass. If the *locus in quo* be not particularly specified in the count, the defendant may demur SPECIALLY, and shew it for cause; for the defendant may justify the taking in that particular place, for causes he could not have any where else. But if the defendant should plead *non cepit*, the count would be good, because then the place cannot be material when the defendant denies the taking.

The writ of replevin is *quod cepit averia & injuste detinet contra vadios & plegios*; to which writ the sheriff returns *replegiari feci*. There you go on in the replevin only for damages for the caption, and then in the count you recite the writ in the *detinuit*, and count in the *detinuit* for damages;—and though the writ be taken out in the *detinet*, yet when the sheriff hath returned *replegiari feci* upon it, that return is a warrant to recite the writ in the *detinuit*;—for if the writ was recited in the *detinet*, and the count was in the *detinuit*, it would be a variance for which the judgment may be arrested, or the defendant might have demurred. But where the sheriff does not replevy the beasts, there you must recite the writ in the *detinet*, and count in the *detinet* also, because the beasts are not delivered; and there you recover as well the value

2Lotw.1150,
Petree v.
Duke.
F.N.B.69.L.
Co.Ent.610,
611.

value of the beasts in damages, as damages for the detention. And this is a shorter way than to sue a *withernam* and *cap.* for a return of the beasts.

3. Of the several pleas to this *action*, and these are of four sorts. Pleas in abatement. The general issue, *non cepit*. The justification; and this of two sorts, either disaffirming property in the plaintiff, or admitting it. The avowry.

As to pleas in abatement. There is a difference between pleas in abatement of the writ in replevin, and in other actions; for in other actions the pleas in abatement go merely to the form of the writ; because other actions are for debt or damages, in which the plaintiff hath no possession of the thing itself until judgment and execution, and therefore the pleas in abatement are to the form of that writ only, and all pleas to the right are in bar of it: but in replevin, the deliverance of the goods is immediate, so that the plaintiff hath the possession before the defendant can plead thereunto; and therefore, according to the genius of this action, pleas that are in abatement, must give the defendant a TITLE to the return of the beasts. For it is not enough merely to quash the writ, as in other cases, where the defendant is *in statu quo* when the writ is quashed;—but in this action, that the defendant may be *in statu quo*, he must not only shew that the writ ought to be quashed, but that he ought to have a return of the beasts himself. And here, the pleas in abatement, differ from the pleas in bar only

only in this; that in abatement they do not avow or acknowledge the caption and detention, which is the gist of the action; but they must go so far as to entitle the defendant to a delivery, or else they do not take away the force and effect of the writ of replevin, which is always executed by the delivery.

Therefore in this action the defendant 1 Vent. 249 may plead PROPERTY in himself in abate- 6 Mod. 81. ment; for by such plea he doth not deny, or confess, and avoid the caption, and therefore it is not a bar; but only shews that the plaintiff hath not a right to a deliverance; and by shewing that, the goods ought to be returned to the defendant on such abatement, as they were before the writ was taken out. But *quære*, for it seems by the later authorities, that it should be pleaded in bar.

[It is to be observed that these *later* Cro Jac. 519. *authorities* are not pointed out, and the edi- 3 Keb. 232. tor, after a diligent search, hath not been 1 Vent. 249; able to find them. There are indeed cases, 6 Mod. 81. in which the courts have determined, that property in the defendant MAY be pleaded IN BAR, but none that EXCLUDE the defendant from pleading it in ABATEMENT: on the contrary, the cases cited in the margin most clearly convey the idea, that *the defendant in replevin may plead property, whether it be in himself or a stranger, either in abatement OR IN BAR, according to his election.*]

If the defendant pleads property in *ŷ. S.* 2 Lev. 92. a stranger, he may plead it in abatement, — Salk. 5. and because he shews that there is no pro- Ld. Raym. 984. S. C. perty

Salk. 94.
 Carth. 243.
 S. C.
 6 Mod. 81.

perty in the plaintiff, and by consequence that he had no right to a deliverance by this writ, he ought to have return without making any conusance.

If the defendant pleads property in the plaintiff and *ŷ. S.*—there the plea is in abatement of the replevin, as it is in other actions; for though it admits a right of deliverance in the plaintiff, yet it does not allow it by a writ under the present form; but gives a better writ to be brought by the plaintiff and *ŷ. S.*—But here the defendant ought to make a conusance; because, this plea not disaffirming the property, it leaves a right in the plaintiff to have his beasts, without such conusance be made.

Raft. Ent.
 554.

As a man may plead in abatement of the writ, so he may of the count; and by abating the count he doth in consequence abate the writ; and there it is pleaded *ad narrationem & breve*: for if a man doth not pursue his writ by a regular count, his writ in consequence is abated. And therefore if a man declare of a caption in *Blackacre*, and the defendant pleads in abatement of the count, that he took them in *Whiteacre*, *absq; hoc* that he took them in *Blackacre*, this will abate the count under *THAT* form. But then he must go over and make conusance; because, not disaffirming the plaintiff's title to the beasts, he leaves the plaintiff a right to retain. But this conusance is not traversable where it is pleaded in abatement; because the plaintiff must maintain the form of his own count without falling on the title of the defendant; and if

Cro. El. 372.
 Mod. Cases
 103.
 Bro. Abr. tit.
 Repl. pl. 31,
 45.
 Vent. 127.
 Salk. 93.
 Carth. 139.
 Ld. Raym.
 1017.

if the plaintiff should join issue on the traverse in the plea of abatement, and traverse the conuſance alſo, it would be double; which would be bad upon ſpecial demurrer; and if the plaintiff traversed the conuſance only, it would be a diſcontinuance of the plea in abatement.

But if a juſtification for *damage feaſant* had been pleaded in bar, there the caption and detention, according to the form of the writ, is acknowledged. And therefore there the plaintiff may traverse the title of the defendant; becauſe the defendant having acknowledged the caption and detention according to the form of the count, he hath put himſelf on the ſtrength of his own title. So in the caſe of time, if the plaintiff in his count lay the caption the 26th of *March*, Doct. Plac. 316. and the defendant pleads in abatement, that he was poſſeſſed of the *locus in quo* by leaſe determinable the 25th of *March*, and that he took the beaſts the 24th of *March* *damage feaſant*, *abſq; hoc* that he took them the 26th;—this is a good plea IN ABATEMENT only;—becauſe it goes only to the form of the plaintiff's count: for the time here becomes neceſſary to be laid in this action, becauſe the defendant may have a right to take at one time, and not at another. But in this and every other caſe in abatement, where the property is not diſaffirmed to be in the plaintiff, the defendant muſt make conuſance of a juſt cauſe of return; for otherwiſe he doth not deſtroy the force and effect of the writ, by which the deliverance was made; but leaves the

K plaintiff

plaintiff a right to retain his own property.

Of the general issue.

Bro. Abr. tit.
Repl. pl. 5.
Vent. 249.

The general issue in replevin is *non cepit*. Here it is to be considered that the caption and detention is only in issue, and not the property; and in this, replevin differs from trespass. For in trespass where the general issue is *non culp.* the defendant may, on evidence, shew a property in himself, because he cannot be guilty of trespass in taking his own goods; but in replevin, upon *non cepit*, the property by the plea is admitted to be in the plaintiff, and therefore is not in question at all; but whether the defendant took the goods mentioned in the declaration. And he cannot be admitted on the issue, to shew where the property was, because he hath put it in issue only, before the jury, whether HE TOOK the beasts or not, and not whose they were.

Str. 507.

[In replevin for taking guns in London, the plaintiff proved a taking in Surrey; upon which it was objected, that the plaintiff had not proved his issue, for the place is material, and therefore part of the issue under the *modo et formâ*. The counsel for the plaintiff admitted that it was traversable; but insisted that by not traversing it particularly, the place was admitted, and could not be insisted on upon *non cepit*. But chief justice Pratt held, that where the plaintiff avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent

sistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. And therefore the plaintiff was nonsuit. But *quære* the legality of this decision.]

In replevin for a mare and colt, the defendant pleads *non est culpabilis de captione prædictâ infra sex annos ultimos elapsos*. Sid. 81, 82. Arundel v. Frail.

The plea was over-ruled, because it gives no answer to the unjust detention, which the replevin complains of, as well as the caption; for the caption may be just, and the detention unlawful. As where the defendant eloids the beasts, or drives them to a castle, so that the sheriff cannot replevy them at all, this is an unlawful detention, however just the caption might have been. And in the present case, it might be that the colt was foaled in the pound, and then was never taken by the defendant, yet it may be unlawfully detained; and though he might not have taken it within six years, yet he might have detained it until the day of purchasing the writ, and that detention is complained of by the writ, and not barred by the statute.

Of the justification.

There is some difference between the 2 Jones 251 avowry and the justification; for the justification confesses the caption and avoids the injustice of it: the avowry MAKES TITLE to such caption of the property of another. The confessing and avoiding the caption may be *quoad* damages only; the avowry is always *pro retorno habendo*.

K 2

1. Of

Vent. 249.
B. o. Abr. tit.
Repl. pl. 3.
6 Mod. 81.

1. Of justifications that disaffirm property in the plaintiff. As if the defendant acknowledges the caption and pleads property in himself; this is a good bar, because it confesses the caption, which is the gist of the action, but avoids the injustice thereof, by shewing that he had a right to take them; and this not only will abate the writ of the plaintiff whereby the deliverance was made, but also destroy all right of complaint for such caption and detention; and therefore goes in bar of the action, and consequently gives a return without consuance *pro retorno habendo*.

2 Lev. 92.
Salk. 5, 94.
6 Mod. 81.

If the defendant confesses the caption, and pleads property in *J. S.* this is in bar of the action, as well as in abatement of the writ;—for this not only shews that the plaintiff had no right to a deliverance upon the writ, but also that he has no cause to complain of the caption and detention against his pledges, which is in bar of the action. And this is not only a justification to cover the defendant from damages, but for the return of the beasts; because he doth not admit property in the plaintiff, but disaffirms it; and therefore the beasts ought to come back to the defendant, who ought to retain the beasts against every one but *J. S.*

Ld. Raym.
217.

2. As to justifications that affirm property in the plaintiff. These cover the defendant from damages only, because the plaintiff is intitled to his beasts, as having property in them; and the defendant in such pleas not making title to the beasts as a pledge to answer any demand, he ought

not to have the beasts back, but may cover himself from the damages only for the caption.

Thus if the lord distrains for homage, and the tenant dies, and his executors sue replevin. Here the defendant may justify and cover the damages, because the distress was rightly taken at first, though by the death of his tenant he can no longer retain it as a pledge for his homage, and therefore cannot be intitled to a return; because the homage was a service to be performed by the tenant *IN PERSON*, and the distress being to compel him to it, cannot be detained longer than his life; therefore the lord must distrain the heir *de novo*.

Doct. Plac.

316.

Ro. Abr. 319.

Danv. Abr.

652.

Of avowries, and the pleas thereto.

Having thus considered the replevin and the writ that issues upon proper returns of the sheriff, we come now to the avowry.

The avowry is the taking up the defence of such distress. It acknowledges the distress taken, but avoids the injustice of the caption complained of, and sets forth a good cause for taking such distress, in order to have it returned again to the defendant. So that in replevin both parties ARE ACTORS;—the plaintiff to have damages for the taking and detaining his goods,—and the avowant to have return of the plaintiff's beasts and damages.

Avowries are either for rents, services, heriots, &c. or for *damage feasant*; and here are to be considered.

THE LAW OF REPLEVINS.

I. What is substance, and what is form.

II. The several pleas to the avowries; and herein of the several traverses and disclaimer.

I. What is substance, and what form in avowries.

At common law the lord was obliged to avow upon his real tenant, which as the antient law stood was easily done, because the tenant paid fines on every alienation, and the alienee was presented by the next homage. But when these small fines for alienation were not gathered, nor the courts regularly kept, the lords were at a loss to find their real tenants, and consequently to know whom to avow upon. To remedy this the *stat. 21 Hen. 8. c. 19. s. 3.* was made; by this the lord may distrain on the lands holden of him, and avow as in lands within his fee or seignory, alledging in the avowry, the lands to be holden of him, without naming any certain person or tenant.

9 Co. 22. a.
Co. Lit.
268. b.
Rast. Ent.
156.

Upon this act it hath been held, that though the words are, that if the lord distrain on the lands holden of him, yet if the lord come to distrain, and the tenant drive the beasts which were once in view of the lord, off the land, or out of the seignory, and the lord pursues and distrains them out of his fee, yet he may avow upon this act;—because the distress, in construction of law, is taken upon the land, by reason of the view and fresh suit of the lord.

Leen. 301.
Cro. Eliz.
146.

In avowry the defendant said that B. was seised of the lands where, &c. and held them

them of *A.* by fealty and rent;—and for rent arrear he made conusance as bailiff to *A.* in land held of him, according to the statute.—This was held a good avowry upon the statute, though it was objected, that having once named the tenant in his avowry, the whole avowry should have been at common law, because the statute was made to establish the avowry without naming the tenant at all, and therefore it ought much more to be good, where he names him but once.

If *A.* holds of *B.* by rent, as of his manor of *C.* and *A.* conveys to the king, and the king grants it over to *D.*—*B.* cannot for his rent avow, as on land held of him; because by *A.*'s grant to the king the tenure is destroyed, though the rent remains; for the king cannot hold of a subject; and therefore *B.* must avow according to the nature and particular circumstances of his case.

In avowries on the statute, the lord alleges that the lands, or *locus in quo*, are held of him by such services, and avows as on lands within his fee or seignior, without naming or avowing upon any certain person or tenant; this distinguishes it from the avowry at common law, wherein the tenant must be named; but in both avowries the lord alleges seisin of the services.

In the avowry at common law, the lord says *J. S.* his very tenant is seised in fee of the *locus in quo*, and that he holds of him by homage, fealty and rent, or such like, of which service the lord was seised by the

Lucy v. Fish-

er.

And. 159.

Broker v.

Smith.

Rast. Ent.

556.

Bro. Abr. tit.

Avow. pl. 4.

Hern's Plead.

727.

Co. Ent. 591.

594, 597, 598.

hands of the said *J. S.* and because the rent, &c. was in arrear, the lord distrains and avows the taking, and prays a return. So that by this avowry to make the distress lawful, the lord must shew A SEISIN of the rent by the hands of some CERTAIN tenant; for the lord's possessory right is mentioned in no other manner, than by shewing that the tenant, who was in the actual possession of the land, did actually pay the rent to the lord, or to those under whom he derives: for if so, the seisin of the tenant of the land, and of those claiming under him, continued for the time of such payment of the rent, to the time of the distress, is a seisin in order to continue the payment to the lord; for out of the yearly profits he ought to have made the payment demanded.—

8 Co. 54. a.
Co. Lit. 298.
b.

Therefore it is not like the case of any real action, where they lay the seisin within the time of limitation, and that they were dispossessed; for in such real actions the count supposes the demandant is out of possession of the thing to be recovered. But in the avowry, the lord supposes his seisin to continue, until the very actual taking of the distress; and therefore the lord need not alledge his seisin to be within forty years, according to the statute of limitation, when the lord supposes himself still seised, even at the very day of the avowry, and that this distress is the very collection of the rent of which he is in possession. If he were not in possession the distress would be unlawful; for if the lord had a right to the services, yet if he was not actually seised of them, he must be
put

put to his writ of customs and services, before he can continue the seisin of the services, in order to recover them in this possessory action.

When the tenant comes in, if he do not disclaim, or plead *hors de son fee*, of which hereafter, he must admit that he is seised of the estate; though he may deny that he holds that estate of the lord by such services, which is a traverse of the tenure; or he may traverse the seisin of the services by that particular hand by which the lord in his avowry alledges himself to be seized:—because, if that seisin be destroyed, which is the seisin from whence the lord continues his own possession to the time of the new caption, there is an interruption of the seisin of the lord, and of his title in this possessory action. And therefore, if that seisin be found against the lord, he cannot recover in replevin, because he is out of possession; but is driven to his writ of customs and services, in order to recover the seisin.

If the lord avows for rent on a gift in tail, or lease for life, or years, there the lord lays, that he, or the person from whom he claims, was seised in fee of the land itself, and that he, or such person, made such demise or gift; and by this method the lord continues his right to seize the distress.

And here plainly the lord continues his seisin to the very time of the distress; because his tenant was seised of the very land itself, in order to raise such rent, and pay it to him by the original stipulation; and therefore the seisin of the tenant was all along

Doct. Plac.
317, 318.
Bro. Abr. tit.
Avow. pl. 52.

along the seisin of the lord, and maintains his possession in order to take pledges for his rent.

But if such gift in tail, or lease for life or years, were made before the statute of limitations, and there had been no seisin continued, there the statute of limitations may be pleaded in bar,—because the words and intention of that statute are to bar such antient rights, where the lord had not actual seisin within the forty years.

8 Co. 65.
Doct. Plac.
317, 318.
Brownl. 169.
170.

If a man makes a grant of a rent-charge, there the seisin of estate is laid in the tenant of the land, and it is the deed that gives him seisin of such rent, or the power to get it. And there if the tenant cannot deny the deed, if the commencement of it be within the act of limitation, the grantee's power of distraining will thereby appear, and his right to continue the possession under that deed.

And if any other actual seisin had been required by the law in cases of leases, gifts in tail, or rent-charges, the lord would have no compulsory means to acquire such rent at first, without the tenant's voluntary payment, which had been to elude such leases, gifts and deeds; and therefore the statute of limitations does not extend to such leases, gifts or deeds of rent-charge, where the law, before the statute, required no seisin at all necessary to be alledged in the avowry; since, as is said, the lord and grantee continue the possession of such rents without actual seisin, and the statute hath not altered the law in that particular.

If *A.* be possessed of a term of years, rendering rent, and distrains the beasts of a stranger for an arrear of this rent, it is not sufficient for *A.* in his avowry to say generally *quod possessionatus fuit* of the *locus in quo*; because *A.* having taken the beasts of a stranger, he must shew by what title he took them; and this cannot be done without alledging a feisin in fee in his lessor, in order to shew a right in himself to distrain.

If *A.* lessee for years, lets for years to *B.* by deed indented, and distrains *B.* for rent, it is sufficient for him in his avowry to say *quod possessionatus fuit*, and leased to *B.* by deed indented; for then *B.* will be estopped to controvert *A.*'s title to the land during the lease; though *B.* had taken a lease of his own land from *A.* But if the lease were by parol, then it seems he must alledge the feisin in fee;—because taking the property of another, and there being no estoppel in the case, whereby the plaintiff in replevin cannot controvert the right of *A.* to the land, it seems that *A.* must shew a right, or else he cannot maintain the taking of another's property. 3 Lev. 146.

[But now by the statute of 11 G. 2. c. 19. s. 22. reciting that “ great difficulties often
“ arise in making avowries or conufance
“ upon distresses for rent, quit-rents, re-
“ liefs, heriots, and other services,” it is enacted “ that it shall be lawful for all
defendants in replevin to avow or make
conufance GENERALLY, that the plaintiff in
replevin, or other tenant of the lands and
tenements whereon the distress was made,
enjoyed

enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such honour, lordship or manor, for which tenements the rent, relief, heriot, or other service distrained, was at the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title of the landlord, lessor, or owner of such manor.”]

2Lutw.1492.

3 Mod. 132.

Carth. 9.

2 Mod. 70.

contra.

See Fort 256.

Salk. 643.

Lucas 37.

If a termor distrains the beasts of another *damage feasant*, and the owner of the beasts brings his action of trespass or replevin, it is not sufficient for the termor in his justification or avowry to say *quod possessionatus fuit* generally; because where the termor takes the beasts themselves for the damages, he must set forth by what right or title he took them, for he cannot seize another's beasts for any damages done to that which doth not appear to be his rightful possession or property; and therefore the termor to justify this caption in trespass, or in his avowry, where the proprietor seeks a restitution of his beasts by replevin, must alledge the seisin in fee in his lessor, and so derive a title to himself.

[In trespass, I believe *quod possessionatus fuit*, is sufficient.]

Raft. Ent.

561. b.

Clift's Entr.

564.

Owen 51.

Dyer 171. b.

But if the avowant for *damage feasant* alledges the *locus in quo* to be his *solum & liberum tenementum*, that is sufficient without alledging the seisin in fee; for the quantity of the estate is not material where the avowant

avowant possesses *jure proprio*; for he hath shewn enough to entitle him to the caption, if the *locus in quo* be his *liberum tenementum*. But the lessee that possesses *nomine alieno* hath no more than a precarious possession, which is either good or bad according to the estate of him in whose right he possesses; and therefore if he doth not shew an estate to entitle himself to the caption, he doth not shew any right to take them at all: for it covers the right only to shew a term, and not a freehold out of which it is derived. It is only the freeholder, or his bailiff, or person deriving under him, that hath authority to take another man's beasts upon the soil; for a stranger that is no bailiff of the freeholder is a trespasser, if he doth it; and therefore if a person doth not shew in his avowry that he doth it in his own right, or by whose right he doth, he shews no right at all to take such distress.

But if the termor instead of taking the beasts into his own hands for a compensation of damages, shall recur to the law to have amends by action of trespass, *quare clausum fregit*, since here he comes to the law only for a compensation for the damages done to his possession, he hath nothing to do but to shew his possession, unless the defendant shew a right to the land itself.

If the grantee of a rent-charge avows for his rent, he must also alledge a seisin in fee-simple in his grantor of the lands out of which the rent issues; for this being a rent not arising from any tenure, doth not turn on the rule that governs the feudal services.

Brown's Ent.

304.

L. Raym.

333.

Clift 642.

Hob. 28.

Bro. Abr. tit.

Avow. pl. 88,

164.

But vide 11
Geo. 2. c. 19.
f. 22. ante
139.

Salk. 562.

Chft. 225.

services. The reason is, that the avowry being in the nature of a declaration, the avowant, as all other plaintiffs in other actions, ought to shew to the court, that what he sues for is subsisting, and this he doth not do unless he alledges a seisin in fee in the grantor; for if the rent-charge was granted in fee by a person who is only tenant for life, the grant determines by his death; and therefore the grantee ought to shew to the court, that his grant has still a continuance; which is best done by alledging a seisin in fee in the grantor, and this seisin in fee in the grantor is traversable.

If tenant in fee leases for years, rendering rent, and brings an action of debt for the arrear of rent, he need not alledge any seisin in fee in his declaration; because the action of debt arises from the contract of the parties, and was not substituted by the feudal law in the place of forfeiture; and therefore in debt for rent, the lessor only declares *quod cum demisit* such lands to *A.* for such a term, rendering such certain rents, by virtue of which demise *A.* entered, &c.

But where in debt for rent the plaintiff sues AS ASSIGNEE OF THE REVERSION AND RENT, it seems by the precedent, that he must alledge a seisin in fee in the lessor; because since the plaintiff did not demise himself, he must shew who did, and that the reversion came by such assignment to him, in order to make his title to the action. For it seems absurd that the plaintiff should say, that the first lessor granted the reversion to him, without first shewing that he

he had it in himself. Hence it should seem to be necessary even in debt for rent, to alledge in this case a seisin in fee in the first lessor, for he doth not come in as a representative of the contractor, but as assignee of the reversion; and therefore must shew the particular estate of the reversioner.

In avowries there must be always a place Sid. 10. 20.
CERTAIN mentioned where the caption was; Hob. 16.

as the avowant must admit the caption to be in the place mentioned in the declaration, in order to shew the cause of taking it there; for if the avowant should lay the taking in another place than the plaintiff hath done, without traversing the place mentioned in the declaration, this would be altogether bad: because the avowant neither confesses and avoids, nor traverses the declaration, and therefore such plea is nugatory, and not to the purpose.

Where a man avows in his own right, Danv. 653.
the form is *quod bene advocat captionem & Cro. Jac. 372.*
juste, &c.—Where he makes conusance in Wheadon v.
right of another, he says, *bene cognovit cap-* Sugg.
tionem, &c. Though this be the regular form, yet it hath been held upon demurrer, that where the defendant avowed in his own right by *bene cognovit captionem, &c.* it was well enough; because the avowry is a confession of the caption, which both the words *advocat* and *cognovit* do confess, and avoids the injustice of such caption for the reasons mentioned in the avowry.

If the defendant avows for rent being Dalison fin.
in arrear at *Michaelmas, & tempore captio-* Benl. 72.
nis;—this is good, though he doth not say, Cro. Jac. 183.
quod adhuc aretro existit: for the avowant
avoids

avoids the injustice of the caption, if he shews that the rent was in arrear at the time he took the beasts. Nor is he obliged to say *quod adhuc aretro existit*, to excuse himself from an unlawful detention; because, after the beasts are once impounded, no subsequent tender or payment can make the detention unlawful in this action.

Cro. Jac. 283.
Bowles v.
Poor.
Bull. 139.
S. C.

In an avowry by husband and wife in right of his wife, for arrears of a rent-charge incurred before the coverture, the avowry concludes, "*and because at Michaelmas, &c. 20 l. was in arrear and not paid to the husband and wife, he distrained and avows, &c.*" It was objected, that by his own shewing the arrears were not due to himself and his wife, and therefore the avowry ill; but the objection was over-ruled, because if he had said, "*for 20 l. arrear he distrained,*" that had been good, and the rest was held surplusage.

Hob. 208.

If one avows as administrator for arrears of a rent-charge, where he may claim the arrears in his own right, and it appears that the avowry is not so framed as to entitle him to the arrears as administrator, yet the avowry is good;—because where there are two titles set forth in the avowry, and only one sufficiently alledged, that one title only gives him as good a right to the rent as both, and therefore he ought to recover, and the avowry as administrator shall be surplusage. As if a rent-charge be granted to the husband and wife during the life of the wife, and the husband dies, and the wife avows as administratrix to her husband, where she might avow *jure proprio*, yet

yet she having a title to, it in her own right by the grant, the avowry is good.

If a man avows for an entire rent, where it appears that he hath title only to a moiety of it, the avowant cannot recover; because he hath not avowed according to the circumstances of his case, and therefore cannot make out his title as he hath laid it. Suppose *A.* and *B.* were jointenants of a rent, and *A.* distrains and avows for the whole, this avowry is bad; for if it should stand, and *A.* should recover his moiety, then there must be two suits for one joint demand, which would be vexatious and absurd. And in this case the avowry and action of debt stand on the same reason, and agree.

So likewise coparceners must join in avowry; therefore if one jointenant or coparcener distrains alone, he must avow in his own right and as bailiff to the other.

If in the avowry the lessor avows for only part of an half year's rent that is due, and doth not shew that the residue is satisfied, such avowry is ill; because where a certain rent is due it must be demanded at once; for if part only should be demanded, and the residue not appear by the avowry to be satisfied, and the avowant should recover that part which he demands, he may then multiply suits by suing for part of his rent at one time and part at another, which is against reason, and the end and policy of the law. And in this also, the avowry and action of debt for rent, agree.

If executors avow on the 32 H. 8. c. 37. for the arrears of a rent in fee granted to
 L the

Saund. 282.

284.

Dappa v.

Mayo, &c.

Cro. Eliz.

340, 637, 651.

Yelv. 23.

Cro. Car. 154.

Rast. Entr.

565. a.

Ro. Abr. 320.

2 Lutw. 1211.

Carth. 328.

Salk. 390.

Carth. 364.

Cro. Car. 104.

137.

Cro. Jac. 498.

4 Mod. 402.

Cro. Eliz.

547.

Miles v.

the Willoughby.

the testator, they must shew that the lands liable to the rent-charge continue in the hands of the tenant or purchaser in whose time the rent sued for incurred; because, this remedy being given by the statute, the method prescribed by the statute must be observed.

2 Mod. 4, 5. In an avowry for a heriot, the avowant as bailiff to *J. S. bene cognovit captionem averiorum prædictorum in prædicto loco*, without saying, *tempore quo*, &c. and yet held good; because the acknowledging the caption as set forth in the declaration, admits it to be at the time laid there.

Lit. Sect. 317. If two tenants in common distrain for
Co. Lit. 198. rent, they must make several avowries;
b. because they claim the rent and reversion
Cro. Eliz. by different titles, and therefore must severally set them forth in distinct avowries.
530.

5 Co. 19. a. If two persons distrain an ox, or an horse,
38. b. and are obliged to make different avowries, both avowries must abate; because if both should shew cause to have return, the court could not give judgment for both, and therefore neither can have it.

Hutton 4. In an avowry for heriots, you cannot
Cro. Car. 260. avow for a heriot generally, but you must
Hob. 176. avow for the best beast or the two best beasts of the tenant, as the case is; for otherwise the plaintiff would be ousted of his plea in bar, that the tenant left no beasts.

II. Of the several pleas to avowries.

21 H. 8. c. 19. Though the avowant may now by the
f. 3. statute avow as in lands holden of him and within his fee and seignior, yet it is provided by the said act, that the plaintiffs
and

and defendants in writs of replevin and second deliverance shall have like pleas and like aid-prayers in all such avowries, confessions and justifications, as they might have had before, and as though the said avowry, confession or justification had been made after the due order of the common law, pleas of disclaimer only excepted. For this reason, and because the lord is still left to his avowry according to the common law, it will be necessary to consider the several answers and pleas that at common law might have been made to the avowry; and herein,

1. Of the disclaimer.
2. Of the plea *hors de son fee*.
3. In what cases the tenure was traversable.
4. In what cases the seisin of the services was traversable.

Of the disclaimer.

And here it is to be observed, that at common law the avowry was always upon some certain person, and if such person claimed or pretended no right to the tenancy, he might have disclaimed. By such disclaimer he denied to hold the tenancy of the land at all. It was a renunciation of his homage and fealty, and that he would not hold of the lord upon any terms. And therefore the lord, on such disclaimer, was intitled to the restitution of the land itself, which was originally given for the services avowed for; and in order to bring back the land itself, the lord had a writ of right, setting forth the proceedings in the replevin, and such disclaimer. Hence we may see the reason why there could be no

Raft. Ent.
224. 225.
Doct. Plac.
133.
Co. Lit. 102.
a. 268. b.

disclaimer to any avowry on the statute of H. 3.—because the avowry on the act is not on any person CERTAIN, but on lands within the lord's fee and seignory; and therefore whoever takes up the defence to such avowry must be only a person concerned in the tenancy; because if an entire stranger should take up the defence, and be allowed to disclaim, the lord could not have return of his distress, but must take his writ of right for the lands themselves; and in the prosecution of that writ he could not prevail, as the rightful tenant would appear to bar him, and so the lord be disappointed both ways.

Doct. Plac.
131, 132.

But a disclaimer cannot be where a man levies a fine of a seignory, and the conu-see brings a *per quæ servitia* to have the attornment of the tenant; because the lord will not be entitled to the services, or to the land itself in case of a disclaimer, until he hath possession of such services by attornment; therefore the tenant in the *per quæ servitia* shall not disclaim, inasmuch as the lord, upon such disclaimer, cannot have a right to the land itself. But whenever the lord is in possession of the seignory, and pursues his right for the services by replevin, *cessavit*, or the like, there the tenant may disclaim; because the lord on such disclaimer shall have the land itself, which was originally given for such services.

Doct. Plac.
132.

Here it is to be noted, that the tenant must be a person capable of the act of disclaimer; for if he be an infant, such disclaimer shall not turn to his prejudice, by reason of his indiscretion.

So

So where the tenant is seised of the lands Doct. Plac.
in right of another, in order to preserve 131, 132.
such right; and therefore the disclaimer of
the abbot shall not hurt the church, nor of
the husband, the wife; because they are
intrusted by law to defend the right of the
tenancy, and not to destroy it.

If there be a lord, mesne and tenant, Doct. Plac.
and the mesne disclaim the right of the 133.
mesnalty, the mesnalty is extinct; and the
tenant holds of the superior lord, as the
mesne held over; for here, by such dis-
claimer, the lord cannot have possession of
the land, because the tenant's interest therein
by the disclaimer of another cannot be
hurt; but the lord comes nearer the te-
nancy by such disclaimer, because, if the
tenant dies without heirs, the escheat of
the lands is immediate to the lord and not
to the mesne.

In a *formedon*, which the statute *de donis* Doct. Plac.
hath given to recover the lands and not 133.
damages, if the tenant disclaim, the de- Co. Lit. 362.
mandant shall recover the land itself im- a.
mediately; but in an assise and writ of
entry, where the demandant seeks damages
as well as the land, it is not enough for
the tenant to disclaim, because then every
disseisor, when the action is brought against
him, would disclaim, in order to screen
himself from damages; but the demandant,
notwithstanding such disclaimer, may aver
that he was tenant of the land, in order
to have his damages.

If a *precipe* be brought against two, and Doct. Plac.
one disclaim, the whole frank-tenement 133.
vests in the other. But if one pleads non-

tenure, the whole does not vest in the other; because though the other be not seised of them, yet a right may remain in him, and his pleading that he doth not hold the lands, doth not vest the right in another.

Doct. Plac.
134.

If one disclaims, and the other pleads non-tenure, the demandant may enter into the whole;—because by the disclaimer of one, the tenancy shall not vest in the other, who hath no seisin against his own plea of non-tenure; and therefore the demandant's right of entry is open to him.

Doct. Plac.
134.

If a *præcipe* be brought against two, and one makes default after default, and the other disclaims, the demandant shall recover the whole; because the default bars one, and the disclaimer the other.

Of the plea of *hors de son fee*.

Rast. Ent.
565. b. See
the form of
the plea.

As the tenant may disclaim, so he may plead *extra feodum*; and such plea doth not amount to a disclaimer; for if they should construe the plea of *extra feodum* to amount to a disclaimer IN ALL CASES, then those tenants that were boundaries of manors, would be exceedingly harassed by the neighbouring lords. And therefore as the tenant might disclaim, which is an entire renunciation to hold of the lord, and whereby the tenant disclaims to pay those services as the price of the land itself, so he may plead *hors de son fee*;—which is taking upon him the state of the land, and acknowledging to hold by such services, if he be within the seignory of the lord. For in this plea he doth not renounce the services,
for

for that is the plea of disclaimer, but he takes up the land under the services the lord demands of him, and owns them as the price of the land, in case the lord be entitled to such services. And therefore the tenant may plead *extra feodum* as well as disclaim in replevin; because he may shew that he is willing to hold by such services, in case the lord be entitled thereunto.

If the lord brings a writ of *mortdauncefor* for his services, the tenant cannot plead *bors de son fee*; because there the lord makes title in his writ, and the tenant must answer to the title set out in the writ; therefore he cannot plead generally, out of his fee, for that doth not answer the title in the writ: but he must plead that the plaintiff's ancestor did not die seised, which goes to the title in the writ. Doct. Plac. 216.

If the lord in replevin do not avow upon his VERY tenant, but upon a stranger, such stranger, when he comes in, may plead that he himself is *extra feodum*; for having never held of the lord, the lord cannot maintain his avowry; the lord cannot say that he held of him, if the tenant never was in his homage. This plea of *bors de son fee* is the only plea that a mere stranger to the avowry, yet made party by *aid prayer*, may plead in ABATEMENT of the avowry. Doct. Plac. 216, 217. 2 Co. 20. b.

But to explain this matter fully, we must consider the antient avowry of the lord upon disseisins committed. On such disseisin, the disseisor did not become tenant to the lord, (not even if the lord had accepted rent of him) so as to prevent the disseisee

from compelling the lord to avow on him; though by such acceptance of rent the disseisor was estopped to say, he was not his tenant; and the lord *quoad* him was also estopped from saying, that he was not his lord. So that if the disseisee died without heirs, the lord could not enter into the tenancy, having already, by his own acceptance of the rent, admitted the land to be full of another: but between the lord and disseisee, there was no estoppel at all: because the disseisin being a tortious act, if the lord did collude with such disseisor, that should be no prejudice to the disseisee. And it was often usual on such disseisins, for the lord to obtain more rents from such disseisors; and when the disseisee came to take possession and put in his beasts, the lord would distrain the beasts of the disseisee, and avow on the disseisor for the rents that he had accepted from him. Now on such avowry of the lord, it was a dangerous plea for the disseisee to say, that "the disseisor was out of the fee of the lord," because the acceptance of such rents and services from the disseisor brought him within the lord's fee; and therefore the disseisee was compelled to shew the special matter, that he was very tenant to the lord;—that he had paid the services, or tendered them, that were due; and that the lord ought to avow on him: the which was in abatement of the lord's avowry, because it destroyed that avowry upon his beasts for the services which the lord had accepted from the disseisor, and compelled the lord to avow the caption of his beasts for the tenure that

9 Co. 21. a.

was

was really due from the disseisee to the lord. But as an inducement to this he was obliged to shew that the rent was tendered, or not in arrear, that the injury might appear on the lord's side, and that he did not accept of another for want of payment from him: and as the disseisee might have entered himself and put in his beasts, so he might have let to another, who might likewise put in his beasts; and then if the lord had avowed upon the disseisor, such lessee might have shewn, that there was a very tenant, the disseisee who had paid or tendered the rent to the lord, and had made a lease to him who put in his beasts which were distrained. For the lessee, who kept possession for the disseisee, had the same privilege that the disseisee himself had, to plead this special matter; because he should not be liable to the services unjustly accepted from such disseisor; and he had a right to *pray in aid* of such disseisee, that the disseisee who had the title-deeds of the land, might be brought in to make out his right; or, if he fail, that the lessee might have the writ *de plegiis acquietandis* against such lessor.

So it is, if the very tenant in possession made a lease to *A.* for years, and the lord had distrained *A.* and avowed upon a mere stranger;—*A.* might upon special matter, have *prayed in aid* of the lessor, and by that means have brought him in to defend the tenancy from the distress of the lord, by compelling the lord to avow upon the lessor: for *A.* being only a termor cannot plead the payment of the rent and services without his lessor,

9 Co. 20.

lessor, who is the very tenant; and when the lessor is brought in, if the services are really done, that abates the lord's avowry. If they are not performed, the lord shall have return of his pledges, but then *A.* hath a remedy over against his lessor by writ *de plegiis acquietandis*.

Co. Lit. 268.
a.

But if the disseisor had died seised, and the lord had accepted rent from the heir of the disseisor who came in by title, the lord was obliged to avow on such heir; and the entry of the disseisee, or the right of putting in his beasts, or demising to his tenants, was taken away; and then the disseisee was not very tenant, nor could he compel the lord to avow upon him until he recovered his right in the real action. Lord *Coke* says, the feoffee of the disseisor is in the same condition with the heir. But *quære* of this, unless it be in antient times, when a feoffment was construed to toll an entry, as well as a descent.

When the lord avows upon a stranger, and takes the beasts of a stranger, who is neither very tenant nor lessee of the very tenant, such stranger can plead nothing but *hors de son fee*; because he hath nothing to do with the right of rent, since the avowry is not on the very tenant. But such stranger may disengage himself by the plea of *hors de son fee*, because the lord hath not shewn just cause of caption of such beasts, if he hath not maintained his avowry by proving such services are due from the person he avowed on.

When

When the tenure is traversable.

And this is when the tenant doth not entirely withdraw himself out of the homage of the lord, but doth not admit the same sort of services as the lord hath avowed for. As if the lord avows for fealty, rent, and suit of court, and alledges seisin of all; if the services were really but fealty and rent, the tenant in such case may traverse the tenure; — that is, he may admit that he holds by fealty and rent, and as to the rent that there is nothing in arrear, and traverse the tenure with an *absque hoc* that the tenancy was held by fealty, rent, and suit of court, *modo & forma prædictâ, &c.* And in this case, though the avowry had been only for rent arrear, yet if the tenure thus traversed be found against the lord, he shall not have return, because the point in issue is found against him. The reason is, because the tenure is the lord's title, and the lord must set forth his title as it really is; and therefore if it be by knight's service, he must set forth by knights service; if it be by fealty only, he must set it forth so; if it be by fealty and rent, he must set forth in that manner; and if the lord fails in making out the title he hath set forth, there is an end of the lord's avowry, because he doth not prove the title he hath alledged. But if the lord sets out a title by 10s. rent, the tenant cannot say that he holds by 5s. *absque hoc* that he holds by 10s.; because the tenant holds by rent-service, whether more or less, and the *quantum* of the rent doth not alter the nature of the service, whether it be less or more. And

3 Co. 33.
59
Bucknal's
Case.
Cro. Eliz.
799.

after the statute of *quia emptores* the services were subdivided, but the tenure remained the same; and therefore it would have been a dangerous thing after the statute, when the services were subdivided and apportioned by the alienation of the tenant, to have suffered the tenant to have traversed the quantity of the services, which were more or less according to his share of the land. They allowed him to traverse the seisin, as is said hereafter, because the lord could not recover more of him in replevin than the services of which he was seised.

9 Co. 35. a.
Doct. Plac.
318.

But the WHOLE tenure is NOT traversable; as in the aforesaid case, the tenant cannot plead that he holds the tenancy of a stranger by such services, *absq; hoc* that he holds them of the avowant: because by such plea the tenant withdraws himself entirely from the homage of the lord, and where he does that, his proper plea is a *disclaimer* or *hors de son fee*.

Where the seisin is traversable.

9 Co. 33.

And this is where the tenant doth not only take the estate of the land upon him, but admits also the tenure by the same sort of services, and disagrees with the lord only in the quantity. As if the lord avows for 10 s. rent, where the original reservation was only of 5 s. and the lord had obtained the seisin of the 10 s. by coercion of distress, the tenant may traverse such seisin, and thereby avoid such encroachment in the avowry. For the tenant in this case, cannot plead *hors de son fee*, because he is plainly within the homage of the lord; nor can he traverse the tenure, because that is
by

by the same sort of services as are avowed for. But he may traverse such seisin of such ENCROACHED services, because what the lord hath obtained by coercion, can be no foundation to ground a right upon. But if such seisin of the 10s. rent had been obtained by the voluntary payment of the tenant, he cannot traverse such seisin, nor avoid the payment of such encroached rent in the action of replevin; for the tenant cannot traverse the tenure for the former reason, nor the seisin, because that issue must be against him, in regard the case supposes the lord to be actually seised by his voluntary payment; and therefore where the single issue is whether the lord is seised or not, it must be against the tenant in his possessory action.

The tenant however may avoid such encroached rent by *ne injuste vexes*; because that is a writ of right, where the mere right to such services may be controverted, and consequently the bare seisin of the services will not avail the lord, unless they were originally reserved. For when the bare right to the rent is in question, there can be no reason to compel the tenant to pay that for ever, which he once paid though voluntarily in his own wrong. So it is in a *cessavit* brought by the lord, because the mere right to the services is controverted in it.

If the tenant, instead of suing a replevin 9 Co. 34. 2. Doct. Plac. for the distress taken by the lord for those encroached services, brings an action of 318. trespass against the lord, there the seisin shall not conclude the tenant. So in an
assise

assise, or writ of *rescous*, brought by the lord; because if the lord hath really no right to the encroached services the lord is punishable as a trespasser for taking the tenant's beasts; and when there is no just cause of caption the tenant may rescue; and if the lord bring a writ of *rescous*, the mere right to the services will come in question; and if that appear against the lord, the tenant hath a right to rescue the beasts distrained.

9 Co. 34. a.

But even the traverse of the seisin in the avowry is to be understood with these restrictions.

Doct. Plac.
318.

For 1. The issue in tail may traverse the seisin of services of the same nature, though the lord had obtained such seisin by the voluntary payment of the donee in tail; because the donee, during the continuance of the intail, cannot charge or incumber the lands intailed, so as to bind or affect the issue; and for the same reason the successor of a bishop or prior, shall traverse the seisin of the encroached rent given by the voluntary payment of their predecessors.

9 Co. 14. 2.
Doct. Plac.
318.

2. So the VERY tenant shall traverse such seisin, if he hath a deed to shew by which the services were reserved; for the deed destroys that title which the seisin of the services gave the lord, if these services appear not to have originally been reserved.

9 Co. 34. b.

3. The seisin of services by incroachment is not material where there is no tenure; because, where there is no tenure, the

the tenant may plead *hors de son fee*, and so discharge himself from ALL services.

4. If the seisin was not within the statute of limitations, the tenant may plead the statute to defeat the seisin of the lord before the statute of limitation; for this is a statute bar to quiet mens possessions against stale demands. But the tenant in such plea must acknowledge the tenure, to give the lord a writ of customs and services, which being an action of an higher nature, hath longer time of limitation allowed to it than a possessory action.

5. In avowries the tenant shall not plead *ne unq; seisie de services* generally, because this amounts to a traverse of the tenure; since if a man had never been seised of an immemorial service, he can have no right to it. And in such a case the tenure ought to have been traversed, which stands confessed in this plea, since he hath not traversed *quod non tenuit*. Doct. Plac. 132. 9 Co. 34. b.

6. The seisin is not traversable but only of services for which the avowry is made, except a seisin be alledged of services of a higher nature, which include those in the avowry. As if the tenure be by homage, fealty, rent, and a pound of pepper, and the lord alledges a seisin of all; and avows only for the pound of pepper;— the tenant cannot traverse the seisin of the rent, because it is not material whether the lord was seised of the rent or not to make out his demand for the pound of pepper. Yet if the tenure be by homage, escuage, and rent, and he alledges seisin of all, and avows for homage which is included in escuage

escuage, there, by traversing the seisin of the escuage, you traverse the seisin of the homage, which the lord demands in his avowry.

4. Of the judgment in replevin.

Co. Ent. 573.
b.

It is already observed that on the execution of the writ of replevin by the sheriff, the beasts distrained are actually returned to the plaintiff, so that he hath the possession and use of the cattle pending the suit; consequently if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry is, *quod* (the plaintiff) *recuperet versus* the defendant, *damna sua occasione præmiss'*, *sed quia nescitur quæ damna præd.* the (plaintiff) *sustinuit occasione præmiss'*, [that the plaintiff recover against the defendant his damages by occasion of the premisses, but because it is unknown what damages the aforesaid (the plaintiff) has sustained by occasion of the premisses,] a writ of enquiry

2d Book of
Judgm. 203.

is awarded to enquire; *quæ damna præd.* (the plaintiff) *sustinuit tam occasione præmiss'*, *quam pro misis et custagiis suis, per ipsum circa seētam suam in hac parte appositis*, [what damages the aforesaid (the plaintiff) hath sustained, as well by occasion of the premisses, as for his costs and charges by him about his suit in this behalf expended.]

Carth. 362.
5 Mod. 118.
Salk. 205.
Co. Ent. 575.
a.

And on the return of this inquisition, the plaintiff hath final judgment, *quod recuperet versus præfatum* (the defendant) *damna sua præd. ad, &c. per inquisitionem præd.' in formâ præd.' comperta, nec non, &c. eidem* (the plaintiff) *ad requisitionem suam pro misis*

Et custagiis suis præd. per curiam hic de incremento adjudicata; quæ quidem damna in toto se attingunt ad, &c. Et præd' (the defendant) in misericordiâ.—"That he recover against the aforesaid (the defendant) his damages aforesaid to £.— by the inquisition aforesaid in form aforesaid found; and moreover £.— to the same (the plaintiff) at his request, for his costs and charges aforesaid by the court here of increase adjudged, which damages in the whole amount to £.— and the aforesaid (the defendant) in mercy."

This writ of inquiry must be understood to issue where the plaintiff hath judgment on a demurrer, *Et c.* and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict ascertains the damages that the plaintiff hath sustained by the unjust caption and detention, and also the costs of suit, and then there is no occasion for a writ of enquiry. The judgment is, "*quod (the plaintiff) recuperet versus (the defendant) damna prædicta per juratores prædictos in formâ prædictâ assessa, nec non, &c. — pro misis, &c. de incremento adjudicata, &c.*—And the defendant *in misericordia*," "that the plaintiff recover against the defendant the damages aforesaid by the jurors aforesaid in form aforesaid assessed; and moreover £.— for costs, *Et c.* of increase adjudged, *Et c.* and the defendant in mercy."

On the other hand, if judgment be for the avowant on demurrer, then the entry is, *b.*
"quod (the plaintiff) nil capiat per breve suum præd' sed sit in misericordiâ pro falso clamore suo, Et præd' (the defendant) eat inde sine
M die,

Co. Ent. 572.

2d Book of
Judgm. 205.

die, &c. Et habeat retorum averiorum præd' detinend' sibi irrepleg' in perpetuum, Et qualiter, &c. vic' constare faciat hic, &c. Et quod præd' (the defendant) damna sua occasione præmiss' recuperare debeat; sed quia
 21 H.S. c. 19. *nescitur, &c.*"—"That the plaintiff take nothing by his writ aforesaid, but be in mercy for his false claim, and the aforesaid (the defendant) go hence without day, &c. and have the return of the beasts aforesaid detained to him irreplevisable for ever, and in what manner, &c. the sheriff make appear here, &c. and that the aforesaid (the defendant) ought to recover his damages by occasion of the premisses; but because it is unknown, &c."

2d Book of
Judgm. 206. But if there be a verdict for the avowant, the jury in that verdict ascertains the damages, and then there needs no writ of enquiry; but the judgment is entered, "*quod (the defendant) habeat retorum averiorum prædictorum, &c. Consideratum est etiam quod præd' (the defendant) recuperet versus præf. (the plaintiff) damna sua præd' &c. per juratores præd' in forma præd' assessa, nec non, &c.—eidem (the defendant) ad requisitionem suam pro misis Et custagiis, &c.*"—"That (the defendant) have the return of the beasts aforesaid, &c. It is also considered, that the aforesaid (the defendant) recover against the aforesaid (the plaintiff) his damages aforesaid, &c. by the jurors aforesaid in form aforesaid assessed; and moreover, £.—to the same (the defendant) at his request for costs and charges, &c."

2d Book of
Judgm. 206. So that wherever the judgment is given on a verdict, either for plaintiff or defendant,

ant, that verdict ascertaining the damages, there needs no writ of enquiry to issue; but where the judgment is not founded on a verdict, but on a demurrer or *non proff*' of the plaintiff, &c. there the damages must be ascertained by a jury on a writ of enquiry; because what damages either party hath sustained, is a matter of fact, and therefore to be settled by a jury. But if both parties consent that the court shall settle the damages without a jury, then the entry is, "*super quæ justic. hic ad petitionem ipsius* (the defendant) *ex assensu præd'* (the plaintiff) *assident damna ipsius* (the defendant) *occasione præmiss'*, &c. *ultra misas*, &c." And this judgment is good, *quia consensus tollit errorem*.

[By the 17 Car. 2. c. 7. it is enacted, that "wherever the plaintiff in replevin, upon a distress FOR RENT, shall be nonsuit before issue joined, in any court of record, the defendant making a suggestion, in nature of an avowry or cognisance for the rent in arrear, to ascertain the court of the cause of the distress,—the court, upon his prayer, shall award a writ to the sheriff, to enquire of the sum in arrear, and the value of the goods or cattle distrained. And that, upon the return of such inquiry, the defendant shall have judgment to recover against the plaintiff the arrearages of rent, in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount to that value, then so much as the value of the goods or cattle distrained shall amount unto, with his full costs of suit; and shall

have execution for the same by *feri facias*, *elegit*, or otherwise." And by the same statute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in case the plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against the plaintiff, then the jurors that are impannelled to enquire of such issue, shall, at the prayer of the defendant, enquire concerning the sum in arrear, and the value of the goods or cattle distrained. And thereupon the avowant, or he that maketh cognizance, shall have the like judgment, &c." as before.

2 Wils. 117.

By this statute the legislature intended, that the proceeding by writ of enquiry, *feri facias*, and *elegit*, should be final, for the avowant to recover his damages, and that the plaintiff should keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is the right judgment; for the statute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

Carth. 253.

The defendant had judgment upon demurrer for a return irrepleviable, as at common law, upon which a writ of enquiry was awarded pursuant to the statute. And on error brought, it was objected, that when the defendant proceeds on the statute, he ought not to have judgment for a return; but the court held that the judgment

ment was well given, for the reasons before mentioned.

But where the defendant pleaded *non cepit*, and after obtaining judgment of *retorno habendo*, procured a writ of enquiry of damages to be executed,—the court set aside the writ of enquiry, and the inquisition taken thereon,—because there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an enquiry for the defendant in replevin. Ca. of Prac. in C. P. 42.

Where the jury who try the issue, omit to enquire of the rent in arrear, pursuant to the statute, no writ of enquiry can be AFTERWARDS awarded to supply the omission; and therefore, in such case, the defendant must pursue the common law judgment of *retorno habendo*. But where the defendant avows, as overseer, for a poor's rate, under the 43 *Eliz. c. 2.* and the plaintiff is nonsuit, or a verdict passes against him, and the jury are discharged without enquiring of the treble damages, given by that statute to the defendant, the defect may be cured by a writ of enquiry; because such enquiry is no more than an inquest of office. 1 Lev. 255. Carth. 362. 3 Will. 442.

As to the costs in replevin, it is to be observed, that as the plaintiff in such action might have recovered damages at the common law, before the statute of *Glocester*, so now by that statute, (*c. 1.*) he is entitled to costs, as a consequence of those damages. But the avowant or defendant in replevin had no right to costs till the 7 *H. 8. c. 4.* which gives damages and

costs to every avowant, and to every person making cognizance, or justifying as bailiff in replevin, for any rent, custom or service, if his avowry, cognizance or justification be found for him, or the plaintiff be otherwise barred. The statute of 21 H. 8. c. 19. extends the same benefit to defendants, avowing, making cognizance, or justifying, for *damage feasant*.

2 Rol. Rep.
437.

It has been holden, that altho' the power of making an avowry be given to an executor by the 32 H. 8. c. 37. which is subsequent to both the statutes which give costs to an avowant,—yet such executor is entitled to costs, altho' they be not mentioned in the statute which gives the avowry.

Hard. 153.

But it has been resolved, that the defendant in replevin shall not recover costs, if he claim property in the distress; because that is a case omitted out of the statutes which give the defendant his costs in replevin. *Tamen quære*; for by the statute of 4 Jac. 1. c. 3. the defendant obtaining judgment, shall recover costs in every action, wherein the plaintiff might have recovered them against the defendant.

10. Jac. 520.

And therefore in another case, where the defendant avowed for an amerciamment by a court leet, which is equally a *casus omisus* with the former; it was holden, that the avowant should have his costs.

When the defendant proceeds by inquiry on the 17 Car. 2. c. 7. he shall recover his full costs of suit, as appears before.

And

And by the 11 G. 2. c. 19. which declares it to be lawful for the defendant in replevin to make a *general* avowry or cognizance for rent, relief, heriot, or other service, it is enacted, that “if the plaintiff in such action shall become nonsuit, discontinue his action or have judgment against him, the defendant shall recover DOUBLE costs of suit.”

The defendant in replevin avowed the taking as a *seizure* for an heriot *custom*; and the plaintiff being nonsuited, a question arose, whether the defendant was entitled to double costs? And it was holden that he was not; for, the avowry not being for a distress, the case is not within the statute. Barnes's notes, 4to. 148.

By the 8 & 9 W. 3. c. 11. it is enacted, that “where several persons shall be made defendants in any action or plaint of trespass, &c. and any one or more of them shall be acquitted by verdict, every person so acquitted shall recover his costs.” But it has been holden, that this statute does not extend to actions of replevin; for the word *trespass*, as it is there used, only relates to trespasses *vi et armis*.] 3 Bur. 1284.

As to the *Retorno Habendo*, and *second Deliverance*.

In all cases where the defendant in replevin avows and hath judgment, on such avowry he shall have return of the beasts awarded; because the avowry allows the caption, but avoids the injustice thereof, by shewing he had good cause of taking

such distress; and consequently, if such cause of caption be approved of by the court, they must, in justice, return the pledge to the avowant.

And where the defendant, instead of an avowry, pleads to the writ of replevin; that is, where he does not admit the caption and avoid the injustice of it, but by plea insists, that the plaintiff ought not to have the writ of replevin, whether he the defendant took them or not; yet here the defendant in some cases shall have return without any avowry or conusance made.— And in order to settle this, it will be necessary to take up a distinction already observed, between pleas that disaffirm property in the plaintiff, and pleas that admit property in the plaintiff. As if the defendant in the replevin pleads property in the beasts in himself, or in a stranger, (whether it be pleaded in abatement of the writ, in bar of the action, or in justification,) if the defendant prevails in it, he shall have return WITHOUT ANY AVOWRY; because if these pleas be true, they destroy all right of complaint in the plaintiff for the caption and retention: and if the plaintiff hath no right to the writ of replevin, under the present form, nor under any other, he ought to have no benefit from his unjust complaint; and therefore the court must award restitution of the beasts to the defendant, out of whose possession they were taken by the replevin.

But if the defendant pleads property in the plaintiff, and *7. S.*—though this plea abates the writ under the present form, yet by

Salk. 94.

Bro. Abr. tit.
Retorn des
Avers, pl. 28.
Vent. 249.

by admitting the property in the plaintiff, it shews that the plaintiff and *J. S.* have a right to a replevin, tho' under another form, and consequently the defendant shall not have return of the plaintiff's beasts, unless he shews good cause for such return, and avoids the injustice of the first caption complained of by the plaintiff.

So if the plaintiff in replevin lays the caption in *D.* and the defendant pleads that he took them in *S. absque hoc* that he took them in *D.*—This plea, if found for the defendant, may excuse him from damages, but can never give him a return of the beasts without a conusance or an avowry ; because he leaves the plaintiff a right to retain his beasts, when he neither denies the property to be in the plaintiff, nor shews any cause why he should take them as a pledge.

Bro. Abr. tit.
Retorn des
Avers, pl. 28.
Rast. Ent.
554.
Ld. Raym.
1017.
Post 175.

If the tenant offers his rent at the time of the distress taken, or before impounding, and the lord refuses to accept it, he shall never after have return of the beasts, though the rent be in arrear ;—because the distress is but a pledge for the rent, and when the rent is offered, the pledge ought to be restored ; consequently the court will never award the return of the pledge to the lord, which he ought to have restored to the plaintiff before the replevin was taken out.

If the plaintiff be nonsuit before he declares, the defendant shall have return of the beasts without making any conusance or avowry ; because where there is no express charge made against the defendant by

Bro. Abr. tit.
Retorn des
Avers, pl. 33.
Dyer 280. pl.
14.

a declaration in court, the defendant hath not an opportunity to shew his cause of caption; and since this is owing to the default of the plaintiff, he shall have no advantage from it by detaining the beasts; and therefore the defendant, on such nonsuit, shall have return, though he hath made no avowry. But if the plaintiff in replevin hath counted, and afterwards is nonsuited; since by the count, the defendant is charged with an unjust caption and detention, he must purge himself thereof by an avowry, before he can be entitled to have return; for the return of the beasts is ordered by the court on the justice of the original caption; and therefore the defendant must first shew the justice of this caption, before he can have a return.

Bro. Abr. tit.
Return des
Avers, pl. 23.
2 Inst. 340.

The return in this action was never irrepleviable at common law, whether the nonsuit of the plaintiff had been before the avowry or after, or before or after issue joined; because where the defendant had judgment for a return on a nonsuit, though after verdict, that judgment was not founded upon the verdict, but on the default of the plaintiff in withdrawing, himself, at any continuance day after the verdict. So that though the defendant had return, yet he had not the justice or legality of his caption established by such judgment; and therefore as long as the caption and detention was not determined by the judgment of the court, so long they allowed the plaintiff after his own nonsuit to take a new replevin.

But

But this was found very inconvenient, because, by this means the defendant could never get restitution of the beasts; and therefore was not likely to recover his rent, since he wanted the pledge to compel the tenant to the payment.

To remedy this mischief the statute of *West. 2. c. 2.* taking notice, that *postquam adjudicatum fuerit distringenti retorum averiorum, et sic districtus, postquam averia sic retornata iterum replegiaverit, et cum viderit distringentem comparentem in curiâ, paratum sibi respondere, defaultam fecerit, ob quam iterum readjudicabitur distringenti retorum averiorum, et sic bis, vel ter, et in infinitum replegiabuntur averia*; provides, that *quam cito adjudicatum fuerit retorum averiorum distringenti, per breve de judicio mandetur vicecomiti, quod retorum habere faciat distringenti de averiis, in quo brevi inferatur, quod vicecomes ea non deliberet sine brevi, in quo fiat mentio de judicio per justiciarios reddito, &c.* which is the writ of *second deliverance*. So that by this act, if the plaintiff in replevin be once nonsuit, he cannot now have a new replevin, but the writ of *second deliverance*; which is a judicial writ, and issued out of the record of the replevin, in which the nonsuit was, and is to this purpose.

“ *Rex vicecomiti E. salutem: Si A. fecerit te, &c. et etiam de catallis retornandis, quæ B. in curiâ nostrâ, &c. adjudicata fuerunt ob defaultam ipsius A. si retorum inde adjudicetur: tunc eidem A. averia et catalla prædicta sine dilatione liberari facias, et pone, &c. prædictum B. &c.*”

Reg. Jud. 58.

b.
2 Inst. 341.

“ George

“ George the third, &c. To the sheriff of &c. greeting: If *A.* shall make you, &c. as well of the cattle to be returned, which to *B.* in our court, &c. were adjudged by reason of the default of the said *A.* if a return of them should be adjudged, that you then cause the beasts and cattle aforesaid to be delivered without delay to the same *A.* and put, &c. the aforesaid *B.* &c.”

2 Inst. 341.

And by the above mentioned act, it is further provided, *quod si iterato ille qui replegiaverit averia, fecerit defaultam, vel alia occasione adjudicetur retorum districtiois, jam bis replegiata, remaneat districtio illa in perpetuum irreplegiabilis.* So that now if the plaintiff do not prevail in the writ of *second deliverance*, but the defendant hath judgment, whether by the nonsuit of the plaintiff, by abatement of the writ, or by discontinuance of the plea, the return is awarded irreplevisable; that is, the defendant shall detain the beasts as a pledge until the rent or duty for which they were originally taken, be paid to the defendant; and the plaintiff shall never be admitted to disturb the defendant's possession, by replevin or writ of *second deliverance*.

2 Inst. 107,
341.

Cro. Jac 148.

But if the plaintiff tender the rent for which the distress was originally taken, the defendant ought to restore the beasts; and if he refuses, the plaintiff may recover them by action of *detinue*: because, notwithstanding the judgment for return irreplevisable, the beasts still remain as a pledge; and if the defendant refuse to make restitution of the pledge upon tender of the rent, his detention

detention then is unlawful, and the plaintiff may punish such detention in an action of *detinue*. For though the return irrepleviable prevents the bringing back of the pledge; yet it does not vest the absolute property thereof in the defendant, but only a qualified property until the rent is paid.

The writ of *second deliverance* is a *superfedeas* in law to the sheriff, to forbear to execute the writ *de retorno habendo*, obtained on the nonsuit of the plaintiff, if it comes to the sheriff before return be made. If after return be made, it is in the nature of a new replevin, as appears by the form thereof before mentioned.

[But though the writ of second deliverance is a *superfedeas* of the writ *de retorno habendo*, yet it has been adjudged to be no *superfedeas* of the writ of enquiry of damages upon the 21 H. 8. c. 19. for those damages are not avowed for, but are given as a compensation for the expence and trouble the avowant has undergone.

So it has been determined that the writ of second deliverance is no *superfedeas* of the writ of enquiry of damages upon the 17 Car. 2. c. 7. And therefore it should seem that the writ of second deliverance is in effect taken away, where the defendant proceeds upon that statute, by writ of enquiry of damages, and does not pursue the common law judgment *de retorno habendo*.]

And the *second deliverance* is always to bring back the same distress which was first taken by the defendant, and for which he

2 Inst. 341.

Dyer 41.

Latch 72.

Palm. 403.

Salk. 95.

2 Will. 116.

Ventr. 64.

2 Inst. 341.

he hath already judgment for a return. So that if after the nonsuit, upon a *retorno habendo*, the sheriff returns *elongata*, by means whereof the defendant hath other beasts of the plaintiff delivered him *in withernam*, in this case, though there never was any return of the original distress made to the defendant, (because they were eloigned by the plaintiff, so as the sheriff could not make any return of them) yet the *second deliverance* must go for the first distress, and the plaintiff must declare of THAT distress. For the writ of second deliverance is a judicial writ, which issues out of the record of the FIRST replevin, and therefore cannot vary from the record out of which it issues; because it seeks a deliverance of those cattle which were formerly adjudged to the defendant on the plaintiff's nonsuit; and therefore *ex vi termini* this second deliverance must be of the same beasts, of which the first deliverance was made to the plaintiff by replevin. But it seems that after the second deliverance purchased, the plaintiff may move the court for a restitution of the *withernam* beasts.

Ld. Raym.
217.

Where the defendant puts in a plea to the writ of replevin, as property in a stranger, or in the defendant;—and these pleas disaffirming the property of the plaintiff, are by verdict found for the defendant, or upon demurrer adjudged for him; in these cases the defendant shall have return irreplevisable: for there could be no new replevin at common law, as upon a nonsuit, because the court had already given their judgment upon the legality of the caption. For if

the property be in the defendant, or a stranger, the plaintiff could have no cause to complain; and therefore to grant a new replevin, or, which is the same thing, not to have made the return irreplevisable, were to leave that same point open to an examination, which had already been determined; and no writ of second deliverance can be given by the statute, for that is only upon the plaintiff's nonsuit.

But if the defendant pleads property in the plaintiff and *ſ. 8.* which only abates *Ante 168,* the writ under the present form; or pleads *169.* *cepit in alio loco*, which abates the count, and consequently the writ; in these cases, as there can be no return without an avowry, for reasons already given; so that return cannot, in the nature of the thing, be irreplevisable; because these pleas, only abating the writ, must necessarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff, for the same beasts which the court hath returned to the defendant irreplevisable. So if the plaintiff confesseth the plea of the defendant to be true, the defendant shall have return, but not irreplevisable.

If the writ of replevin abate for any *2 Inst. 340.* misprision in the clerk, the defendant shall have no return at all; because the plaintiff is in no default, but the officer: so that, after such abatement of the writ, the plaintiff's possession of the beasts continues. And therefore it seems that the defendant, in this case, is driven to a new distress.

But

2 Inst. 340.

But if the writ abate by misinformation, or other default of the plaintiff, the defendant shall have return of the beasts, but not irreplevifable; because the defendant, by pleading to the writ, allows the plaintiff another writ, under another form.

2 Inst. 340.

The act which awards the return irreplevifable, extends only to the king's SUPERIOR courts of justice. For the act directs, *quod attachietur ille qui distrinxit ad veniendum ad certum diem coram justiciariis, coram quibus placitum deducatur in presentia partium*;—which words are to be understood of the king's justices in his superior courts. For the judges of inferior courts, are looked upon as more subject to mistake and partiality, and therefore not to be trusted with the power of awarding a return irreplevifable, which is for ever to conclude the plaintiff. But it seems that where judgment was given upon verdict, and not upon nonsuit, the inferior courts could award a return irreplevifable at common law.

We come now to shew what remedy the defendant hath when he cannot come at the beasts, on the writ *de retorno habendo*.

2 Inst. 338.

It is already observed, that by the before mentioned act of *West. 2. c. 2.* the sheriff, before he executes the writ of replevin, is obliged to take from the plaintiff *non solum plegios de prosequendo, sed etiam de averiis returnandis, si adjudicetur returnand'*; & si quis alio modo plegios ceperit, respondeat ipse de pretio averiorum, et habeat dominus distringens recuperare per breve quod reddat ei tot averia vel catalla, et si non habeat ballivus

unde reddat, reddat superior suus. The method ^{2 Inst. 340.} of proceeding upon this act is, that if the ^{3 Mod. 56,} sheriff by the writ *de retorno habendo* cannot ^{57.} find the original distress, but returns *elongata*, the defendant hath a *scire facias* to summon the persons who became pledges for the plaintiff, at the execution of the original replevin, that the plaintiff would make return of the original distress, if return thereof should be awarded. This *scire facias* brings the pledges into court, and thereby gives them an opportunity to contest, why the defendant should not have return of their beasts, since the plaintiff's beasts cannot be found, for whom they were pledges. If the pledges cannot shew cause, then the defendant hath A WRIT to have re- ^{Rast. 569.} turn of the beasts of the pledges, instead of ^{570. which} the plaintiff. ^{see.}

[But here it may be proper to observe, ^{Ld. Raym.} that the process against the pledges in re- ^{278.} plevin, in such courts as are not of record, is not properly a *scire facias*; for every *scire facias* ought to be grounded upon a record; but it is rather A PRECEPT in nature of a *scire facias*.]

If the pledges prove insufficient, so as ^{2 Inst. 340.} the sheriff can find none of their cattle, and thereby is obliged to return *nihil* on the ^{Bro. Abr. tit.} writ issued against the beasts of the pledges, ^{Retorn des} the sheriff himself, by the said act, then ^{Avers, pl. 2.} becomes liable. And the defendant hath a ^{Dalt. Sher.} *scire facias* grounded upon the said act, ^{275.} *quod reddat ei* (the defendant) *tot averia* or *cattalla*. [Or, in such case, the defendant may ^{Ld. Raym.} proceed against the sheriff by action on the ^{273.}

N

case,

case, for omitting to take pledges, or for taking such as are insufficient.

But it should be remembered, that there is another act of parliament relative to pledges in replevin; and that is the 11 G. 2. c. 19. which ordains, that, "the sheriff, or other officer, granting a replevin, shall first take in his own name, from the plaintiff and two pledges, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for returning the goods, in case a return shall be awarded; which bond may be assigned to the avowant, who may bring an action thereupon in his own name."—

The mode of proceeding on this act is now generally preferred, to the old remedy by *scire facias*, where the replevin is upon a distress for rent. And it is not affected by the 17 2 Will. 42. Car. 2. c. 7. for where the avowant had judgment for want of a plea in bar, in pursuance of that statute, it was held, that he had two methods of proceeding in his election; either to execute a writ of enquiry, or to sue upon the replevin bond; the plaintiff not having prosecuted his suit with effect.

11 H. 6. 16. b. If the sheriff upon a replevin take pledges *de retorno habendo*, and upon a return awarded return, *quod averia elongata sunt*, and then a *scire facias* is brought against the pledges, and a *nihil* is returned, an action lies against the sheriff; or, an action may be maintained against him, upon suggestion of this matter.

From hence it should seem, that it is not necessary to sue out a *scire facias* against the

the pledges, and to have it returned *nihil*, in order to ground an action against the sheriff for their insufficiency. And this opinion is authorized by the following determination.

An action on the case was brought against the sheriff for taking insufficient pledges upon a replevin, to which he pleaded not guilty; and a verdict being found against him, judgment was given thereon in the court of *C. B.* A writ of error was brought in *B. R.* and it was objected, first, that an action on the case was not the proper remedy; and secondly, that supposing such action lay, there ought to have been a *scire facias* first sued out against the pledges. As to the first objection, the court held that by the statute of *Westm. 2.* the party distraining has an interest in the pledges, and if the sheriff omits to take them, or, which is the same thing, takes insufficient ones, the party is aggrieved, and consequently is entitled to his action. And as to the second objection, it was determined, that tho' a *scire facias* may be brought against the pledges, yet it does not follow from thence, that an action does not lie against the sheriff, without first bringing a *scire facias* against the pledges. For tho' some books (2 *Inst.* 340. *F. N. B.* 74. *F. Bro. sci. fa.* 3. *Rast.* 569. *b. Co. Ent.* 637. *Skin.* 244.) mention such a previous step, yet, as the statute does not direct it, and as no case declares it to be necessary, it would be hard to require such a circuitous mode of proceeding: and therefore the judgment of *C. B.* was affirmed.]

Rous v. Patterson.
16 *Vin. Abr.*
399.

So that the defendant is now secured against the danger he was exposed to at common law, which was, that the plaintiff who had the possession of the distress restored to him by the execution of the replevin, would often sell or dispose of them pending the suit; and so the defendant, though he had judgment, lost the fruits of it.

There is another remedy for the defendant, where the sheriff returns *elongata* on the writ *de retorno habendo*, and that is by *withernam* against the plaintiff's beasts; but this has been already mentioned, and discussed.

VIII. Of the writ of recaption.

F.N.B 71.E.

It is already observed, that where the defendant hath judgment upon his avowry in replevin, he shall have restitution of the beasts, to detain them as a pledge, until the rent or duty for which they were taken be paid or satisfied; and since he hath got security to have return upon making out the justice of his first caption, it is highly reasonable, that pending that suit, the tenant should be protected from farther distresses, for the same rent or cause, for which the first distress was taken. For this purpose the writ of recaption was framed; in which, if the defendant be convicted, he shall be fined to the king; because by the second caption the defendant takes upon him to determine the justice and legality of the first, while that very point is under the consideration of the court of justice in which

which the replevin depends. For if the first distress were lawful, he shall have return of it, and therefore the second is unreasonable; if the first were unlawful, much more so is the second taking for the same cause; so that the recaption lies even where the cause of the first caption was just.

But it seems that if *A.* distrains beasts *damage feasant*, and pending that suit, the same cattle or other cattle of the same proprietors, trespass on the soil of *A.* — *A.* may distrain again pending the first suit; because each distress is for a DISTINCT and SEVERAL trespass or injury, for which *A.* is entitled to satisfaction. The restitution of the cattle for the first trespass will be no compensation for the second trespass, since *A.* cannot legally withhold them as a pledge for satisfaction of a second trespass, when the first is satisfied. F.N.B. 71.E.

[And if a plaint be removed out of the county into the common pleas by *pone* or *recordari*, and afterwards the plaintiff be nonsuit in the common pleas, before or after an avowry made, the lord after this nonsuit may distrain again for the same cause, and the tenant shall not have a recaption; because there is not any plea depending; and yet the plaintiff may sue a writ of second deliverance upon the same record.] Id. 72. D.

The design then of the writ of recaption being to prevent a second distress for the SAME rent or duty, it follows that the defendant cannot avow as in replevin, because the avowry is in order to have a return of the pledges; but in recaption, F.N.B. 72. B.

whether the first distress were just or unlawful, the defendant cannot have return of the beasts under the notion of the pledge; for that were to invert the design of the law, by allowing the defendant a second distress, by judgment upon that very writ, which was framed to punish the person taking a second distress, for the same thing.

F.N.B.72.B. In the writ therefore of recaption, the defendant must JUSTIFY as in trespass; because since he cannot avow the taking under the notion of a pledge for a rent or duty, (inasmuch as he hath already a pledge for that, which will be returned to him, if in the event of the suit in replevin the rent appears to be in arrear) he must therefore be looked upon as a trespasser, unless he can justify the taking
 29 E. 3. 28. for ANOTHER cause. And his defence must be thus;—*defendit vim & injuriam quando, &c. & quicquid est in contemptum domini regis & ejus mandati.*

Hence it is, that there are no pledges *de retorno habendo* taken from the plaintiff, as in the replevin; because tho' the deliverance of the beasts to the plaintiff be immediate, as in the replevin, yet the defendant can have no return. For if the rent or duty was unpaid, for which the distress was taken, the defendant will have restitution of his first distress; which being to remain in his hands till the rent be paid, there is no reason for the restitution of the second distress; and consequently no occasion for the pledges *de retorno habendo*, as in the original replevin.

And

And here it is not necessary to entitle a man to the writ of recaption, that the SAME BEASTS or cattle be taken the second time, which were first taken; but only that the cattle or beasts of the SAME PERSON were distrained for the SAME RENT or duty; for the injury is the same to the plaintiff in replevin, whether the first distress be again taken, or any other goods or cattle of the plaintiff, and the writ of recaption is to punish the injury. F.N.B. 72 G.

But if the lord distrains the beasts of his tenant for rent, and afterwards distrains the beasts of J. S. a stranger, being on the land, for the same rent; in this case no writ of recaption lies for this second distress; not for the tenant, because the second distress is not of the tenant's beasts; —nor for J. S. because the beasts of J. S. were not formerly taken, and therefore J. S. must take out an original replevin, or bring his action of trespass, as he thinks fit. F.N.B. 71 H.

Yet if the lord distrains his tenant, and pending that plea, commands his servant to distrain the tenant again, for the SAME rent, the tenant shall have a recaption against the lord himself for the second distress; because the second distress is esteemed in law to be taken by the lord himself, according to the rule *qui facit per alium, facit per se ipsum*. So if the servant had taken the second distress without the lord's command, yet if the lord had afterwards, by any subsequent act, agreed to the taking of the second distress, as by joining in *aid* with the servant to defend the jus-

THE LAW OF REPLEVINS.

tice of the caption ;—such subsequent agreement makes it a distress of the lord, and to have been taken in his right *ab initio*. For *omnis ratihabitio mandato equiparatur* ; and a parol agreement of the lord to the second distress seems sufficient.

But if there be no such command, or subsequent agreement of the lord, the tenant shall have no recaption either against the lord or the servant, though the servant makes conscience of the second distress in right of his lord, and for the same rent for which the lord took the first distress : for the writ of recaption is to punish the second caption, only where it is wilfully made by the SAME person that made the first, or by another under his direction or authority ; and it may be, that the lord and his servant had not notice of each other's caption.

F.N.B. 71.G. So that where there is no precedent command, nor a subsequent agreement of the lord to the second caption, the tenant is left to his action of trespass against the servant ; because the second caption is a violation of property, and unlawful, tho' the rent be in arrear ; since the lord, by the first distress, hath taken a pledge for his rent, which will be returned to him if, in the event of the suit in replevin, the tenant be found to be in arrear.

F.N.B. 71.I. If the lord distrains the beasts of *A.* and
72 E. *B.* for rent, and for the same rent distrains a second time the beasts of *A.* only, *A.* shall have a writ of recaption against the lord ; because there is a distress of *A.* already

ready for that rent, which the lord will have a return of, if the rent be found in arrear. But if the first distress had been only of *A.* the tenant, and the second distress had been the cattle of *A.* and of *B.* a stranger, which they have in common, *Fitz-Herbert* makes a doubt whether *A.* in this case shall have a recaption, because of *B.*'s interest in the cattle; for it is plain *B.* cannot join in the recaption, because his beasts were never distrained before.

If the lord distrains his tenant, and F.N.B.71.M. he replevies, and the lord avows for rent, and the tenant pleads *rien arrear*, or levied by distress, and pending this suit other rent becomes due, the lord may distrain again the beasts of the tenant for the last rent incurred, and no writ of recaption lies for the tenant; because these distresses are for two distinct causes. But if the tenant had pleaded to the avowry in the first replevin, *hors de son fee*, and pending that suit the lord had distrained again for another half year's rent, the tenant should have a writ of recaption; because by the plea of *hors de son fee* the lord's title to the rent itself, and not to this or that particular arrear, is in dispute, and that title may be determined by the first caption; and therefore the second distress being unnecessary to try the title to the rent, the writ of recaption lies to prevent it, and punish the lord for taking the second distress, and to protect the tenant from such oppression.

And this writ of recaption lies for the F.N.B.72 A. tenant before avowry made by the lord in the

the first replevin ; for otherwise the remedy would not be adequate, because the lord might harrafs the tenant by several distresses, before the lord, by the rules of the court, could be compelled to avow. But then the tenant must, in his declaration on the recaption, aver that the second distress was taken for the same cause as the first ; otherwise the tenant fails in making out to the court his title to the writ of recaption, and consequently cannot punish the lord for taking the second distress.

F.N.B.72.G. [And a recaption lieth as well where the plea is depending in the county before the sheriff, as where it is depending before justices of record.]

APPENDIX.

PRECEDENTS of Pleadings in Replevin.

THE king, &c. We command you Writ of re-
cause to be replevied the cattle of *B.* which
D. took and unjustly detains, as it is said,
and afterwards thereupon cause him justly
to be removed, that we may hear no more
amour thereupon for want of justice,
&c.

A. B. complains against *C. D.* in a plea *Plaint.*
of taking and unjustly detaining his cattle
against sureties and pledges, &c.

Pledges to prosecute, { *E. F.*
 { and
 { *G. H.*

Walker

Walker against Towerfy and others.

M. 9 W. 3. Roll 48.

Declaration.
Pract. Reg.

157.

Midd', to wit, **J**OH^N Towerfy, Robert Wheeler and William Stubbins, were summoned to answer to Thomas Walker in a plea, why they took a silver porrenger of the said Thomas and unjustly detained it, against surety and pledges until, &c. And whereon the same Thomas by J. L. his attorney complains that the said John, Robert and William, on the first day of May in the 9th year of the reign of the Lord William the third, now king of England, &c. in the Charter-house in the county of Middlesex aforesaid, in a certain place there called the dwelling-house of him the said Thomas, took the said porrenger of him the said Thomas, and unjustly detained it, against surety and pledges until, &c. whereby the same Thomas says that he is prejudiced, and hath damage to the value of 30*l*. And therefore he produces the suit, &c.

* Cognisance
by overseers
for a poor's
rate.

And the said John, Robert and William, by R. H. their attorney come and defend the force and injury when, &c. and well acknowledge the taking of the porrenger aforesaid in the said place in which, &c. and justly, &c. because they say, that at the said time when, &c. the same John and Robert, being overseers of the poor of the parish of St. Sepulchre in the county of Middlesex, by virtue of a certain warrant under the hands and seals of William Withers,

thers, Esq; and *Thomas Smith*, Esq; then two of the justices of the lord the now king, assigned to preserve the peace in the county aforesaid (*quorum unus*) to the warden of the church and the overseers of the poor of the same parish, or any of them, directed, at the said place in which, &c. demanded of the said *T. Walker* to pay them 10*s.* 6*d.* of lawful money upon him duly assessed towards the relief of the poor of the parish aforesaid, by the authority and according to the tenor, purport and effect, of a certain statute made and provided in a parliament of the lady *Elizabeth*, late queen of *England*, &c. held at *Westminster* in the county of *Middlesex* in the 43*d* year of her reign; and because the same *Thomas* then and there refused to pay the said 10*s.* 6*d.* to them the said *John* and *Robert*, they the same *John* and *Robert*, as overseers of the poor aforesaid, and the said *William* at their request and in their aid, for the preservation of the peace of the said lord the king, (the same *William* being then a constable within the parish aforesaid) by virtue of the statute and warrant aforesaid well acknowledge the taking of the porrenger aforesaid, the said time when, &c. in the said place in which, &c. in the name of a distress for the said 10*s.* 6*d.* upon him the said *T. Walker* as aforesaid assessed towards the relief of the poor of the parish aforesaid, then being in arrear and unpaid, and justly, &c. And this they are ready to verify: wherefore they pray judgment, and a return of the porrenger aforesaid, to be adjudged to them, &c.

43 Eliz. c. 2.
§. 19.

Repl.
*De injuria sua
propria.*

And the said *Thomas* says, that the said *John, Robert* and *William*, by the reason before alledged, the taking of the porrenger aforesaid of him the said *Thomas* in the said place in which, &c. ought not to acknowledge just, because he says, that the said *John, Robert* and *William*, the day and year aforesaid in the declaration aforesaid mentioned, of their own wrong, without such cause by them in their cognisance aforesaid above mentioned, the porrenger aforesaid of him the said *Thomas* in the said place in which, &c. took and unjustly detained, against surety and pledges, &c. in manner and form as the said *Thomas* above against them complains : and this he prays may be inquired of by the country : and the said *John, Robert* and *William* likewise, &c. Therefore, &c.

Crosse against Bilson.

Declaration.
For taking a
mare in the
highway.
Salk. 3.
Pract. Reg.
157.

North'ton, to wit. *JOHN Bilson* was summoned to answer to *Samuel Crosse* in a plea, why he took a mare of him the said *Samuel* and unjustly detained it, against surety and pledges, &c. And whereon the same *Samuel* by *W. L.* his attorney complains, that the said *John* on the first day of *October* in the 12th year of the reign of the lord *William* the third, late king of *England*, &c. at *Hardingston* in the county aforesaid, in a certain place there called the *king's highway*, a mare of him the said *Samuel* took and unjustly detained it, against surety and pledges, until,
&c.

Ec. whereby the same *Samuel* says that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the suit, *Ec.*

And the said *John Bilson* by *J. B.* his attorney comes and defends the force and injury when, *Ec.* and as bailiff of the most noble *William* lord *Leimpster* well acknowledges the taking of the mare aforesaid the said time when, *Ec.* in a certain place called the *queen's highway*, and justly, *Ec.* because he says, that the said place contains, and the said time when, *Ec.* did contain in itself, half a rod of land with the appurtenances in *Hardingston* aforesaid; which said half rod of land long before and the said time when, *Ec.* was parcel of a certain antient messuage in *Hardingston* aforesaid; which said messuage long before, and the said time when, *Ec.* was the soil and freehold of the said lord *Leimpster*; and because the mare aforesaid the said time when, *Ec.* was in the said half rod of land in which, *Ec.* doing damage there, the said *John*, as bailiff of the said *William* lord *Leimpster*, well acknowledges the taking of the mare aforesaid, in the place in which, *Ec.* and justly, *Ec.* doing damage there, *Ec.* without that, that the said *John* took the mare aforesaid in a certain place called the *king's highway*, as the said *Samuel* against him hath declared: and this he is ready to verify: wherefore he prays judgment, and a return of the mare aforesaid, to be adjudged to him, *Ec.*

And

Cognisance
for damage
feasant.

Plea in Maintenance of the declaration.

And the said *Samuel* says, that the said *John Bilson*, as bailiff of the most noble *William* lord *Leimpster*, the taking of the mare aforesaid ought not to acknowledge just, because he says, that he the said *John Bilson* the said time when, &c. took the mare aforesaid in the said place then called the *king's highway*, in manner and form as the said *Samuel* above by declaring hath alledged: and this he prays may be inquired of by the country.

Demurrer.

And the said *John* says, that he to the plea of the said *Samuel* above in replying pleaded hath no necessity, nor is by the law of the land obliged in any manner to answer, because he says, that the same plea is not sufficient in law to maintain his declaration aforesaid: and this he is ready to verify: wherefore for want of a sufficient replication in this behalf the same *John* as before prays judgment, and that the declaration aforesaid may be quashed.

Joinder.

And the said *Samuel*, for that he hath above alledged sufficient matter in law for him the said *Samuel* to maintain his action and declaration aforesaid, which he is ready to verify, which said matter the said *John* doth not deny, nor to the same in any wise answer, but that averment hath altogether refused to admit, prays judgment, and his damages by reason of the taking and unjust detention of the mare aforesaid, to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premisses before they give judgment thereon, day is given to the parties aforesaid.

1 Sid. 189,
190.

1 Vent. 135,
136.

Cro. El. 202.

aforesaid here until from the day of St. *Michael* in three weeks to hear their judgment thereon, because the same justices here thereof not yet, &c. On which day here comes as well the said *Samuel* as the said *John* by their attornies aforesaid; and hereupon the premisses being seen, and by Judgment for the justices here more fully understood, it the plaintiff. seems to the same justices here, that the plea of the said *Samuel* above in replying pleaded is sufficient in law to maintain his declaration aforesaid, as the said *Samuel* hath above alledged; wherefore the said *Samuel* ought to recover his damages by reason of the premisses against the said *John*: but Inquiry a- because it is unknown what damages the warded. said *Samuel* hath sustained by reason of the premisses, the sheriff is commanded, that by the oath of twelve good and lawful men of the county aforesaid he diligently inquire what damages the said *Samuel* hath sustained, as well by reason of the premisses, as for his costs and charges by him about his suit in this behalf expended; and the inquisition which he shall thereof make, certify here on the octave of St. *Hilary* under the seal, &c. and the seals, &c. On which day here comes the said *Samuel* by his attorney aforesaid; and the sheriff, to wit, *Cesar Child*, Bart. hath now returned here a certain inquisition taken before him at the town of *North'ton* in the county aforesaid on the 19th day of *January* last past by the oath of twelve, &c. whereby it is found that the said *Samuel* hath sustained damages by reason of the premisses, besides his costs and charges by him about his suit in this

O

behalf

Final judgment.

behalf expended, to 80 s. and for those costs and charges to 2 d. Therefore it is considered, that the said *Samuel* do recover against the said *John* his damages aforesaid to 80 s. and 2 d. by the inquisition aforesaid in form aforesaid found, and also 12 l. 17 s. 4 d. to the said *Samuel* at his request for his costs and charges aforesaid, by the court here of increase adjudged; which said damages in the whole amount to 16 l. 17 s. 6 d. And the said *John* in mercy, &c.

General errors assigned.

Afterwards, to wit, on day next after in this same term, before the lady the queen at *Westminster* comes the said *John* by *A. M.* his attorney, and says, that in the record and proceedings aforesaid, and likewise in the rendition of the judgment aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said *Samuel Crosse* against him the said *John Bilson*; when, by the law of the land of this kingdom of *England*, judgment in the plea aforesaid ought to have been given for the said *John* against the said *Samuel*: there is error also in this, to wit, that by the record aforesaid it appears that the said *John* was summoned to answer to the said *Samuel* in the plea aforesaid; yet no original writ between the parties aforesaid, in the plea aforesaid, is filed of record, nor remains of record in the said court of the lady the queen of the bench; therefore in that there is manifest error: there is error also in this, to wit, that by the record aforesaid it appears

No original.

No warrant of attorney.

pears that the said *Samuel*, in the said court
 of the lady the said queen of the bench,
 came and appeared by *W. L.* his attorney ;
 yet the said *W. L.* had no warrant of attor-
 torney of record by writ of the now lady
 the queen, nor without writ, to warrant his
 appearance for the same *Samuel* in the plea
 aforesaid : there is error also in this, to wit,
 that by the record aforesaid it appears, that
 the said *John*, in the said court of the said
 lady, the now queen of the bench, appear-
 ed by *William Marriot* his attorney ; never-
 theless *W. M.* had no warrant of attorney
 of record by writ of the lady the queen,
 nor without writ, to warrant his appearance
 for the said *John* in the plea aforesaid : and Several certi-
 the same *John* prays several writs of the oraries pray-
 lady the queen, to wit, one to the chief ed.
 justice of the said lady the queen of the
 bench, and another writ to the *custos bre-*
vium of the said lady the queen of the bench
 aforesaid to be directed, to certify the said
 lady, the now queen, more fully the truth
 thereof : and to him they are granted, &c.
 Whereupon *Tuesday* next, after 15 days of Rule to re-
 the *Holy Trinity*, is given by the court of turn them.
 the said lady the queen now here, to return
 to the court of the said lady the queen, be-
 fore the queen herself at *Westminster*, the
 said several writs of *certiorari* above prayed :
 the same day is given to the said *Samuel*
 there, &c. And the said chief justice of
 the bench aforesaid, and the said *custos bre-*
vium of the said lady the now queen, on
 that day have not, nor hath either of them,
 returned the several writs aforesaid, neither
 O 2 have

No error.

have they, or either of them, done any thing therein : and hereupon the said *Samuel* freely here into court comes and says, that there is no error either in the record and proceedings aforesaid, or in the rendition of the judgment aforesaid ; and prays that the court of the said lady the queen, now here, may proceed to the examination as well of the record and proceedings aforesaid, as of the matters aforesaid above for error assigned, and that the judgment aforesaid may be in all things affirmed : but because the court of the said lady the queen, now here, are not yet advised to give their judgment of and upon the premisses, day therefore is given to the parties aforesaid, before the lady the queen, until in a month of *St. Michael* wheresoever, &c. to hear their judgment thereon ; because the court of the said lady the queen now here thereof not yet, &c. On which day, before the lady the queen at *Westminster*, come the parties aforesaid, by their attornies aforesaid ; whereupon as well the record and proceedings aforesaid, and the judgment on the same given, as the said causes and matters above for error assigned and alledged, being seen, and by the court of the said lady the queen now here more fully understood and diligently examined, because it seems to the court of the said lady the queen here, that the judgment aforesaid is in nothing vitious or defective, and that there is no error in that record ; it is considered, that the judgment aforesaid be in all things affirmed, and remain in its full force and effect, the
said

Judgment
affirmed.

faid causes above for error assigned in any wise notwithstanding, &c. And it is further considered by the same court, that the faid *Samuel* do recover against the faid *John* 12 l. to the same *Samuel* by the court of the faid lady the queen now here by his assent adjudged, according to the form of the statute thereof lately made and provided, for his costs, charges and damages, which he hath sustained by reason of the delay of execution of the judgment aforesaid, on pretence of prosecuting the faid writ of the lady the queen to correct error of and upon the premisses; and that the same *Samuel* may have thereof his execution, &c. 3 H. 7. c. 10.

Hubbard against Handford.

Midd', to wit. **R**ichard Handford was summoned to answer to *Richard Hubbard*, in a plea, why he took the goods and chattels of him the faid *Richard Hubbard*, and unjustly detained them, against surety and pledges, until, &c. And whereon the same *Richard Hubbard* by *J. P.* his attorney complains, that the faid *Richard Handford* on the 7th day of *October* in the 2d year of the reign of the lord and lady *William* and *Mary*, now king and queen of *England*, &c. at the parish of *St. Margaret Westminster* in the county aforesaid, in a certain place there called *Peter-street*, took the goods and chattels following, to wit, one jack, two spits, 18 pewter plates, &c. (reciting several other particulars) of the faid

Declaration.
Replevin in
K. B.

Richard Hubbard, and unjustly detained them, against surety and pledges, until, &c. whereby the same *Richard Hubbard* says, that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the suit, &c.

Sir Robert
Marsham sei-
sed in fee of
the place
where, &c.
demised it to
the defendant
for 51 years.

And the said *Richard Handford* by J. L. his attorney comes and defends the force and injury, when, &c. and well avows the taking of the goods and chattels aforesaid, in the said place where, &c. and justly, &c. because he says, that the same place, where the taking of the goods and chattels aforesaid is supposed to be, contains, and at the same time when the taking of those goods and chattels is supposed to be, did contain in itself, a certain piece or parcel of land, with the appurtenances, in a place called *Peter-street*, otherwise *Bowling-alley*, in the parish of *St. Margaret Westminster* aforesaid, in the county aforesaid; of which said piece or parcel of land, with the appurtenances, one *Robert Marsham*, knt. before the said time when, &c. was seised in his demesne as of fee; and being so thereof seised, the said *Robert*, before the said time when, &c. to wit, on the 16th day of *May*, in the first year of the reign of the lord and lady the now king and queen, at the parish of *St. Margaret Westminster* aforesaid, in the county aforesaid, demised the same piece or parcel of land, with the appurtenances, to the said *Richard Handford*, to hold to the same *Richard* and his assigns from the feast of the Blessed Virgin *Mary* then last past before the date of the same demise, for the term of 51 years from thence

thence next ensuing and fully to be compleat and ended: by virtue of which said demise the said *R. Handford* was possessed of the same piece or parcel of land for the term aforesaid; and so being thereof possessed, the same *R. Handford*, afterwards, and before the said time when, &c. had erected and built the said messuage or tenement on the piece or parcel of land aforesaid, and was thereof possessed; and being so thereof possessed, he the same *Richard Handford*, before the said time when, &c. to wit, on the 20th day of *December*, in the first year of the reign of the said lord and lady the now king and queen abovesaid, demised the messuage aforesaid, with the appurtenances, to the said *Richard Hubbard* from the feast of the birth of our Lord then next following for the term of one whole year from thence next ensuing fully to be compleat and ended; yielding therefore for the same year to the said *Richard Handford*, or his assigns, the rent of 15 *l.* of lawful money of *England*, at the four most usual feasts in the year, to wit, the feasts of the annunciation of the Blessed Virgin *Mary*, *St. John* the baptist, *St. Michael* the archangel, and the birth of our Lord, by even and equal portions: by virtue of which said demise the said *Richard Hubbard* into the messuage aforesaid with the appurtenances entered, and was thereof possessed, and the same messuage with the appurtenances for the space of three quarters of a year occupied; and because the sum of 11 *l.* 5 *s.* of the rent aforesaid, after the demise so made

who demised
it to the
plaintiff for
a year at 15 *l.*

and for three
quarters rent
arrear di-
strained.

Repl' That
the rent was
not in arrear.

Issue.

for the said three quarters of a year at the feast of *St. Michael* last past, and before the taking of the goods and chattels aforesaid, were to the same *Richard Handford* in arrear and unpaid, the same *Richard Handford* well avows the taking of the goods and chattels aforesaid in the said place where, &c. and justly, &c. for the said 11 l. 5 s. to the same *Richard Handford* in form aforesaid being in arrear, as in the messuage aforesaid with the appurtenances to the distress of the said *Richard Handford* in form aforesaid charged and bound: and this he is ready to verify: wherefore he prays judgment, and a return of the goods and chattels aforesaid, to be adjudged to him.

And the said *R. Hubbard* says, that the said *R. Handford* for the reason before alledged ought not to avow the taking of the goods and chattels aforesaid in the said place where, &c. just, because he says, that the said 11 l. 5 s. of the rent aforesaid at the said time when, &c. were not in arrear and unpaid to the said *Richard Handford*, nor was any penny thereof at the said time when, &c. in arrear to the said *Richard Handford*, as the said *Richard Handford* in his avowry aforesaid hath above alledged: and this he prays may be inquired of by the country: and the said *Richard Handford* likewise, &c. Therefore the sheriff is commanded, that he cause to come before the lord and lady the king and queen from the day of the Holy *Trinity* in three weeks wheresoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because

because as well, &c. The same day is given to the parties aforesaid, &c. On which day before the lord and lady the king and queen at *Westminster* come the parties aforesaid by their attornies aforesaid; and the sheriff hath not returned the writ, nor done any thing therein; therefore as before the sheriff is commanded, that he cause to come before the lord and lady the king and queen from the day of *St. Michael* in three weeks wheresoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid, &c.

Legg against Stephens and others.

Gloucester, to wit. **T** *Thomas Stephens*, esq; Dec *tion.*
Robert Parker, esq;
 and *Richard Broke*, were summoned to answer to *Nicholas Legg* in a plea, why they took the cattle of him the said *Nicholas* and unjustly detained, against surety and pledges until, &c. And whereon the same *Nicholas* by *P. Hodges* his attorney complains, that the said *Thomas*, *Robert* and *Richard*, on the tenth day of *November* in the 32d year of the reign of the lord *Charles* the second, now king of *England*, &c. at the parish of *Old Sodbury* in the county aforesaid, in a certain place there called the *Stub Riding*, took the cattle, to wit two oxen, of him the said *Nicholas* and unjustly detained them, against surety and pledges

pledges until, &c. whereby the same *Nicholas* says that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the suit, &c.

Avowry for a
distress for an
amercement
at a leet.

And the said *T. Stephens*, *R. Parker* and *R. Broke*, by *T. Edwards* their attorney come and defend the force and injury when, &c. and the said *T. Stephens* and *R. Parker* well avow, and the said *Richard*, as bailiff of the said *T. S.* and *R. P.* well acknowledges the taking of the cattle aforesaid in the said place where, &c. and justly, &c. because they say, that the same place, where the taking of the cattle aforesaid is supposed to be, doth contain, and at the said time, when the taking of those cattle is supposed to be, did contain in itself 80 acres of meadow with the appurtenances, called *Stub Riding*, situate in the parish of *Old Sodbury*, and then and from time immemorial was and yet is parcel of the manor and within the manor of *Old Sodbury* in the county aforesaid, and within the jurisdiction of the court-leet and view of frankpledge within specified; and that long before the said time when, &c. to wit, on the 10th day of *March* in the 32d year of the reign of the said lord the now king, and long before, the said *T. S. R. P.* and one *J. Neale* late of *Deane* in the county of *Bedford*, esq; were jointly seised of and in the said manor of *Old Sodbury* aforesaid with the appurtenances, situate within the parish of *Old Sodbury* aforesaid, in their demesne as of fee; and that at the said time when, &c. the said *N. Legg* was and yet is occupier of the said close called *Stub Riding*, and that the

Seisin.

the said *T. S. R. P.* and *J. N.* and all those whose estate the same *T. R.* and *J.* have Prescription.
in the same manor with the appurtenances, from time immemorial have had, and been accustomed to have, within the manor aforesaid, a certain court of view of frankpledge, and all things which to a court of view of frankpledge belong, of all the inhabitants and resiants within the manor aforesaid twice a year, to wit, once within a month next after the feast of *Easter*, and again within a month next after the feast of *St. Michael* the archangel, before their steward of that court for the time being within that manor yearly to be held, as to the said manor with the appurtenances belonging and appertaining: and the said Court-leet.
Thomas, Robert and *Richard* farther say, that before the said time when, &c. to wit, at a court of view of frankpledge of the said *Thomas, Robert* and *John*, held at *Old Sedbury* aforesaid within the manor aforesaid, within a month next after the feast of *Easter*, to wit, on the 19th day of *April* in the 32d year of the reign of the said lord the now king of *England*, &c. before *T. Edwards*, being then steward of the said *T. Stephens, R. Parker* and *J. Neale*, of the court of view of frankpledge, by the oath of 12 free and lawful men within the parish aforesaid resiant and inhabiting, then and there to inquire and present those things which to the court-leet and view of frankpledge aforesaid then belonged, then in the same court being charged and sworn, then and there in the same court it was pre-Presentment.
sented, among other things, that the said
Nicholas

For stopping
a way.

Amercement
affixed.

Nicholas Legg the now plaintiff, then and for three months then last past being occupier of the said close called the *Stub Riding* within the jurisdiction of that court, had not opened the king's highway, being within the precinct of the manor aforesaid, and within the precinct of the leet aforesaid, and the jurisdiction of the said court of view of frankpledge, leading from the parish of *Yate* in the county aforesaid cross the said close called the *Stub Riding* unto and into a certain common field called *Horwood Common* within the precinct of the same manor, and within the precinct of the said leet, and the jurisdiction of the court of view of frankpledge aforesaid, which before then there within the jurisdiction of the court-leet aforesaid he had stopped up and straitened, and the same way so straitened and stopped up then and for the space of three months then last past had continued straitened and stopped up, to the common nuisance of the people of the said lord the king there by that way desiring to pass; whereupon the said *N. Legg*, the occupier of the said close called the *Stub Riding*, for the cause aforesaid, at and by the same court of view of frankpledge then and there was amerced; which said amercement by affeerors then and there in the same court of view of frankpledge, to wit, *N. White* and *T. Adey*, Affeerors in the same court, thereto then charged and sworn, then and there was duly affeered to 40 s. and farther in the same court by the said then steward of the said court, and the jurors aforesaid, it was ordered, that the said *N. Legg*, being the

the occupier of the close aforesaid, should open and leave open the way aforesaid for the subjects of the lord the now king there after to travel and pass before the 23d day of *May* then next following, under the penalty of 4*l.* of lawful money of *England*, to be forfeited to the lord in default thereof: and the same *T. Stephens*, *R. Parker* and *R. Broke* farther say, that the said *N. Legg* afterwards, to wit, the same day, year and place last mentioned, had notice of the order aforesaid, and that he being as aforesaid the occupier of the close aforesaid called the *Stub Riding*, did not open the same way for the liege subjects of the said lord the king there to travel and pass at any time before the said 23d day of *May* then next ensuing, according to the form of the order aforesaid, by reason whereof at another court of view of frankpledge of the said *T. Stephens*, *R. Parker* and *J. Neale*, held at *Old Sodbury* aforesaid within the manor aforesaid, before the steward aforesaid, within one month next after the feast of *St. Michael*, to wit, on the 23d day of *October* in the 32d year of the reign of the said lord the king abovesaid, by the oath of twelve other free and lawful men, being then in the same court last mentioned, lawfully sworn and charged to inquire and present in form aforesaid, it was in the same court presented, that the said *N. Legg*, the occupier of the close aforesaid called the *Stub Riding*, had not opened the same way for the liege subjects of the lord the now king there to travel and pass, according to the form of the

Order to open
the way.

Notice.

Presentment,
that it was
not opened.

Death of one
of the lords.

the said order last mentioned in that behalf so as aforesaid then before for that purpose made; and that by reason thereof the said *N. Legg*, the occupier of the said close called the *Stub Riding*, had forfeited to the same *T. Stephens*, *R. Parker* and *J. Neile*, the lords of the court aforesaid, and of the manor aforesaid with the appurtenances being then in form aforesaid seised, the said sum and penalty of the said 4*l.* of lawful money of *England*: And the said *T. Stephens*, *Robert Parker* and *Richard* farther say, that afterwards, and before the said time when, &c. to wit, 28th day of *October* in the 32d year of the reign of the said lord the now king, the said *John Neile* at *Old Sodbury* aforesaid in the county aforesaid died, whereby not only the said manor with the appurtenances came to the same *T. Stephens* and *R. Parker* by right of survivorship, but the right of having the said amercement and penalty accrued to them the said *Thomas* and *Robert*: and the same *T. Stephens*, *Robert Parker* and *Richard* farther say, that at the time of the several presentments and courts aforesaid so as aforesaid held and made, the way aforesaid was stopped and straitened, and so continued, by the said *N. Legg*, the occupier of the close aforesaid, to the common nuisance of the subjects of the said lord the king; and because the said sum and penalty of 4*l.* above mentioned at the said time when, &c. was in arrear and unpaid, altho' it was demanded of the said *N. Legg*, to wit, at *Old Sodbury* aforesaid, the same *T. Stephens* and

and *R. Parker* in their own right well avow, and the said *R. Broke*, as bailiff of the said *T. Stephens* and *R. Parker*, and by their command, well acknowledges the taking of the cattle aforesaid, then being the cattle of the said *N. Legg* at the said time when, &c. in the said place where, &c. for the said penalty of 4*l.* being in form aforesaid due and in arrear, and justly, &c.

Avowry for
non-pay-
ment.

And the said *Nicholas* says, that neither the said *Thomas* and *Robert* the taking of the cattle aforesaid in the said place where, &c. for the reason aforesaid before alledged ought to avow just, nor the said *Richard* for the same reason the same taking in the same place ought to acknowledge just, because by protesting that there is not any such king's highway as is above supposed, for plea the same *Nicholas* says, that the way aforesaid was not straitened and stopped by the said *Nicholas* in manner and form as the said *Thomas* and *Robert* above by avowing, and the said *Richard* above by acknowledging, have supposed: and this he is ready to verify: wherefore for that the said *Thomas Stephens*, *Robert Parker* and *Richard Broke*, the taking of the cattle aforesaid have above confessed, the same *Nicholas* prays judgment, and his damages by reason of the taking and unjust detention of those cattle, to be adjudged to him, &c.

Bar, protesting there was no such way, says he did not stop it.

And the said *Thomas Stephens*, *Robert Parker* and *Richard Broke* say, that the plea aforesaid by the said *Nicholas* above in bar to the avowry and cognisance aforesaid above pleaded, and the matter in the same

Demurrer.

contained, are not sufficient in law to preclude them the said *Thomas, Robert* and *Richard*, from having their avowry and cognisance afore said, and that they to that plea in manner and form afore said pleaded have no necessity, nor are by the law of the land obliged in any manner to answer: and this they are ready to verify: wherefore, for want of a sufficient plea in this behalf, the same *Thomas, Robert* and *Richard*, as before, pray judgment, and a return of the cattle afore said, together with their damages, costs and expences, by them about their suit in this behalf sustained, according to the form of the statute in such case made and provided, to be adjudged to them, &c. And for causes of demurrer in law, the same *Thomas, Robert* and *Richard*, according to the form of the statute in such case lately made and provided, do set down, and to the court here express the causes following, to wit, because the matter is traversed otherwise than it is alledged in the declaration, whereby the plaintiff is obliged to prove what he hath not alledged, and likewise because the matter traversed is not traversable by the laws of this kingdom of *England* in the manner in which it is traversed in the plea.

The causes.

27 El. c. 5.
4 Ann. c. 16.

Joinder in
demurrer.

And the said *Nicholas* says, that the plea afore said by him the said *Nicholas* above in bar to the avowry and cognisance afore said above pleaded, and the matter in the same contained, are good and sufficient in law to preclude the said *Thomas, Robert* and *Richard*, from having their avowry and cog-

cognifance aforefaid; which faid plea, and the matter in the fame contained, the faid *Nicholas* is ready to verify and prove, as the court, &c. And becaufe the faid *Thomas, Robert* and *Richard*, do not answer to that plea, nor the fame hitherto in any wife deny, the fame *Nicholas* as before prays judgment, and his damages aforefaid by reason of the taking and unjust detention of the cattle aforefaid, to be adjudged to him, &c. But becaufe the court of the faid lord the king here are not yet advised to give their judgment of and upon the premisses, day therefore is given to the parties aforefaid, before the lord the king from the day of *St. Michael* in three weeks wherefoever, &c. to hear their judgment of and upon the premisses, becaufe the court of the faid lord the king here thereof not yet, &c.

Ingram and *Hale* at the fuit of *Fletcher*.

M. 7 W. 3. Roll. 107.

Stafford, to wit, *Joseph Ingram* and *John Declaration.*

Hale were summoned to answer to *James Fletcher* in a plea, why they took a cow of him the faid *James* and unjustly detained it, against surety and pledges, &c. And whereon the faid *James* by *John Lilly* his attorney complains, that the faid *Joseph* and *John* on the 20th day of *February* in the 7th year of the reign of the lord *William* the third, now king of *England*, &c. at *Shenston* in the county

P

afore-

aforesaid, in a certain place there called the *Lane*, took the cow aforesaid of him the said *James* and unjustly detained it, against surety and pledges, until, &c. whereby the said *James* says that he is prejudiced, and hath damage to the value of 20*l.* And therefore he produces the suit, &c.

Cognisance
for a distress
for a fine at
a court-leet.

And the said *Joseph* and *John Hale* by *Thomas Callowe* their attorney come and defend the force and injury when, &c. and as bailiffs of *Rowland Fryth*, Gent. well acknowledge the taking of the cow aforesaid in the said place in which, &c. and justly, &c. because they say, that the same place in which the taking of the cow aforesaid is supposed to be contains, and at the said time when the taking of the cow aforesaid is supposed to be, contained in itself an acre of land with the appurtenances in *Shenston* aforesaid; which said town of *Shenston* is, and at the said time when, &c. and also from time out of mind was, within the manor of *Shenston* with the appurtenances in the county aforesaid; of which said manor with the appurtenances the said *Rowland* is, and at the said time when, &c. and long before was, seised in his demesne as of fee; and the said *Rowland*, and all those whose estate he hath in the same manor with the appurtenances, for time out of mind have had, and been accustomed to have, a court-leet or view of frankpledge of the same manor, and whatever to view of frankpledge belongs, of all the inhabitants and residents of that manor, before the

Seisin in fee.

Prescription
for a court-
leet.

the steward of the same court for the time being, every year within a month next after the feast of *St. Michael* the Archangel, at that manor yearly to be held, as to the same manor with the appurtenances belonging: and the same *Joseph* and *John* farther say, that within the manor aforefaid there is, and from time out of mind hath been, such custom, that the jurors to inquire and present those things, which to that court-leet and view of frankpledge belong, charged and sworn, at the court of view of frankpledge of the manor aforefaid, held at that manor within a month next after the feast of *St. Michael* the archangel, yearly have chosen, and for all the time aforefaid have been accustomed to choose, a proper man from the inhabitants within the manor aforefaid to be constable of the constablewick of *Shenston* aforefaid, to serve for one year in that office; which said man so elected hath taken upon himself, and for all the time abovefaid hath been used and accustomed to take upon himself that office, and hath taken and been accustomed to take an oath for the due execution of that office, under a reasonable penalty, for all the time abovefaid, by the jurors aforefaid at such court-leet and view of frankpledge in that behalf set: and the same *Joseph* and *John* farther say, that the said *Rowland* being lord of the manor aforefaid, and of the same in form aforefaid seised, at a court-leet or view of frankpledge of that manor, held at that manor within a month next after the feast of *St. Michael* the archangel, to wit, on

Custom to choose a constable.

Objected, that it should be for one year next ensuing.

A court-leet held.

The plaintiff
elected con-
stable.

The order of
the jury.

The penalty
for not serv-
ing.

the ninth day of *October* in the fifth year of the reign of the lord *William* now king and the lady *Mary* late queen of *England*, &c. before *Henry Fryth*, gent. then steward to the said *Rowland* of that court, the said *James Fletcher* then and long before being an inhabitant within the manor aforesaid at *Shenston* aforesaid, and a proper man to be constable of the said constablewick of *Shenston* aforesaid, by *E. Thornton*, *T. Grace*, *J. C. J. A. J. H. W. M. W. R. N. W. T. S. J. M. J. S. J. A.* and *J. D.* good and lawful men, and inhabiting within the manor aforesaid, and then and there in the same court charged and sworn to inquire and present those things which to that court-leet and view of frankpledge belonged, duly and according to the custom aforesaid was chosen to be constable of the constablewick of *Shenston* aforesaid for one year then next ensuing to serve in that office; and those jurors then and there in the same court ordered, that the said *James* should take his oath for the due execution of his office aforesaid, under the penalty of forfeiting 40*s.* whereof the said *James Fletcher* immediately afterwards, to wit, the same day and year there had notice: * nevertheless the said *James* hath not

* The chief justice held this to be naught; for, said he, they should only elect him, and he should have notice of such election, and if he did not thereupon go to a justice of peace to be sworn, he should be presented for this default at the next court, and should be amerced, and the amercement affect'd. The court also held it naught for not laying the notice more particular, as that he was present in court;
or

not taken his oath for the due execution of the office of constable aforesaid, nor hath executed or taken upon himself that office, but to do it then and often afterwards there absolutely refused; wherefore afterwards and before the said time when, &c. to wit, at a court-leet or view of frankpledge of the said manor of the said *Rowland*, held at that manor within a month next after the feast of *St. Michael* the archangel, to wit, on the 11th day of *October* in the 6th year of the reign of the said lord king *William* and the lady *Mary*, late queen of *England*, before *Henry Fryth* then steward to the said *Rowland* of that court, by *Edward Thornton*, *J. C. W. P. T. G. T. G. J. P. J. J. E. H. T. S. J. M. W. M. G. H. J. S.* the younger, and *J. A.* good and lawful men then inhabiting within the manor aforesaid, then and there in the same court sworn and charged to inquire and present those things which to that court-leet or view of frankpledge belonged, it was presented, that the said *James Fletcher*, because he was duly elected to be constable of the constablewick of *Sbenston* aforesaid at the last leet held for the manor aforesaid, and under the penalty of 40s. on him set, was ordered to take upon himself that office, and execute it, and take his oath in form aforesaid for

or that he had notice given that he was elected constable, and required to take an oath before a justice of peace. A second presentment *prout per record*, &c. The fine not paid. *Note*; it is said in a case in *Moore*, that the bailiffs should have had a warrant from the steward to distrain.

the due execution of that office ; which, or any part whereof, he had not done, wherefore he had forfeited to the lord of the manor aforesaid the said 40s. of the penalty aforesaid, then to be paid to the lord of the manor aforesaid, as by the record thereof in the custody of the said steward of the court of the manor of him the said *Rowland* at that manor remaining more fully appears : and because the said 40s. for that penalty to the same *Rowland*, so as aforesaid being lord of the manor aforesaid, at the said time when, &c. were in arrear and unpaid, the same *Joseph* and *John Hale*, as bailiffs of him the said *Rowland*, well acknowledge the taking of the cow aforesaid in the said place in which, &c. and justly, &c. for the same 40s. for the penalty or amercement aforesaid to the said *Rowland* so being in arrear and unpaid, and within the manor aforesaid, &c.

Demurrer.

And the said *James* says, that by any thing by the said *Joseph* and *John* above in the cognisance aforesaid by pleading alledged, the same *Joseph* and *John* the taking of the cow aforesaid in the said place in which, &c. ought not to acknowledge just, because he says, that the plea aforesaid by them the said *Joseph* and *John* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to acknowledge the taking of the cow aforesaid in the said place in which, &c. just, and that he to that cognisance in manner and form aforesaid made and pleaded hath no necessity,
nor

nor is by the law of the land obliged, to answer: and this he is ready to verify: wherefore for want of a sufficient plea in this behalf the same *James* prays judgment, and his damages by reason of the taking and unjust detention of the cow aforesaid, to be adjudged to him, &c.

And the said *Joseph* and *John* say, that the plea aforesaid by them the said *Joseph* and *John* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law for them the said *Joseph* and *John* to acknowledge the taking of the cow aforesaid in the said place in which, &c. just; which said plea, and the matter in the same contained, they the said *Joseph* and *John* are ready to verify and prove, as the court, &c. And because the said *James* hath not pleaded or answered to that cognisance, nor hitherto any way denied it, the same *Joseph* and *John* pray judgment, and a return of the cow aforesaid, together with their damages, costs and charges, according to the form of the statute in such case made and provided, to be adjudged to them, &c. But because the court of the said lord the king now here are not yet advised to give their judgment of and upon the premisses, day therefore is given to the parties aforesaid before the lord the king until wheresoever, &c. to hear their judgment of and upon those premisses, because the court of the said lord the king now here thereof not yet, &c.

Sylas Titus, Esq; against Parkins, Knt.

Declaration. *Hertford*, to wit. *William Parkins*, late of *Bushey* in the county aforesaid, Knt. was summoned to answer to *Sylas Titus, Esq;* in a plea, why he took the cattle of him the said *Sylas* and unjustly detained them, against surety and pledges, &c. And whereon the same *Sylas* by *John Warburton* his attorney complains, that the said *William* on the 18th day of *May* in the first year of the reign of the lord *James* the second, now king of *England*, &c. at *Bushey*, in a certain place there called *Marrybill Ground*, the cattle of him the said *Sylas*, to wit, 36 wether sheep, 12 ewe sheep and 8 lambs, took and unjustly detained them, against surety and pledges until, &c. whereby the same *Sylas* says that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the suit, &c.

3 Lev. 225.
Avowry and
cognisance
for damage-
feasant.

And the said *William* by *Randal Baldwin* his attorney comes and defends the force and injury when, &c. and the same *William* in his own proper right well avows, and as bailiff to *Algernon* Earl of *Essex*, well acknowledges the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. because he says, that the same place, in which the taking of the cattle aforesaid is supposed to be, contains, and at the said time, when the taking of the cattle aforesaid is supposed to be, did contain in itself two acres of pasture with the appurtenances in *Bushey* aforesaid; which

which said two acres of pasture with the appurtenances are, and at the said time when, &c. were, the soil and freehold of them the said *William* and *Algernon* earl of *Essex*; and because the cattle aforesaid at the said time when, &c. were in the said two acres of pasture eating up the grass in the same then growing, and doing damage there, the same *William* in his own proper right well avows, and as bailiff to the said *Algernon* earl of *Essex*, well acknowledges the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. so doing damage there, &c.

And the said *Sylas* says, that the said *William*, for the reason before alledged, the taking of the cattle aforesaid in the said place in which, &c. ought not in his own proper right to avow, and as bailiff of the said earl to acknowledge just, because he says, that the said two acres of pasture in which, &c. are, and at the said time when, &c. and also from time immemorial were, parcel of the manor of *Bushey* and customary land of the same manor, and demised and demisable by copy of court-roll of that manor, by the lord or lords of the same manor, or by their steward of the court of that manor for the time being, to any person or persons willing to take them in fee-simple, or otherwise, at the will of the lord or lords, according to the custom of the manor aforesaid: and the same *Sylas* farther says, that the said earl and *William* before the said time when, &c. to wit, on the 21st day of *April* in the first

Bar, that the locus in quo is copyhold held of the manor of *Bushey*, &c.

That the descendant being lord of the manor, granted it to

the plaintiff
in fee, ac-
cording, &c.

first year of the reign of the said lord the now king above said, were lawfully lords of the manor aforesaid; and the said earl and *William*, being then lords of the manor aforesaid, the same earl and *William* afterwards and before the said time when, &c. to wit, on the same 21st day of *April* in the first year above said, at a court of them the said earl and *William*, of their manor aforesaid, then held for that manor within the manor at *Bushey* aforesaid in the county of *Hertford*, by one *Thomas Smith*, Gent. then their steward of the court of their manor aforesaid, by copy of court-roll of that manor granted the said two acres of pasture with the appurtenances in which, &c. among other things, to the said *Sylas*; to have and to hold to the same *Sylas*, his heirs and assigns for ever, at the will of the lords, according to the custom of the manor aforesaid; and the same *Sylas*, according to the custom of the manor aforesaid, then and there was admitted tenant thereof: by virtue of which said grant and admission, the same *Sylas* before the said time when, &c. into the said two acres of pasture with the appurtenances in which, &c. among other things, entred, and was and yet is thereof seised in his demesne as of fee, at the will of the lords, according to the custom of the manor aforesaid; and he the said *Sylas* being so thereof seised, the same *Sylas* before the said time when, &c. put his cattle aforesaid into the said two acres of pasture in which, &c. to feed on the grass there then growing, and

And he being
seised put in
his cattle,

those cattle were in the said two acres of pasture in which, &c. feeding on the grass and the de- there then growing, until the said *William* fendant dis- *Parkins* on the said 18th day of *May* in trained them. the first year abovesaid, at *Bushey* aforesaid, in the said two acres of pasture, called *Marrybill Grounds*, in which, &c. took the same cattle of the said *Sylas* and unjustly detained them, against surety and pledges, until, &c. as the same *Sylas* above against him complains: and this he is ready to verify: wherefore for that the said *William Parkins* the taking of the cattle aforesaid hath above confessed, the same *Sylas* prays judgment, and his damages by reason of the taking and unjust detention of those cattle, to be adjudged to him, &c.

And the said *W.* says, that well and true it is, that the said two acres of pasture with the appurtenances in which, &c. are, and at the said time when, &c. and also from time immemorial were, parcel of the said manor of *Bushey*, and customary lands of the same manor, and demised and demisable by copy of court-roll of that manor, by the lord or lords of the same manor, or by their steward of the court of that manor for the time being, to any person or persons willing to take them in fee-simple, or otherwise, at the will of the lord or lords, according to the custom of the manor aforesaid; and that the said earl and *W.* before the said time when, &c. to wit, the said 21st day of *April* in the first year of the reign of the said lord the now king abovesaid, were law-

Repl. that the land is held of the manor of *B.*

Grant by
copy.

lawfully lords of the manor aforesaid ; and that the said earl and *W.* then being lords of the manor aforesaid, the same earl and *W.* afterwards and before the said time when, &c. to wit, on the said 21st day of *April* in the first year abovesaid, at *Bushey* aforesaid in the county of *Hertford* aforesaid, by the said *T. Smith*, then their steward of the court of their manor aforesaid, by copy of court-roll of that manor granted the said two acres of pasture with the appurtenances in which, &c. among other things, to the same *Sylas*; to have and to hold to the same *Sylas*, his heirs and assigns for ever, at the will of the lords, according to the custom of the manor aforesaid; and that the said *Sylas*, according to the custom of the manor aforesaid, was then and there admitted tenant thereof; and that by virtue of the grant and admission aforesaid, he the said *Sylas* before the said time when, &c. into the said two acres of pasture with the appurtenances among other things entred, and was thereof seised in his demesne as of fee at the will of the lords, according to the custom of the manor aforesaid, as the said *Sylas* above by pleading hath alledged: but the said *W. Parkins* farther says, that the said two acres of pasture with the appurtenances in which, &c. together with the other lands and tenements in the same copy mentioned, and by the same copy to the said *Sylas* and his heirs granted, and to which the said *Sylas* was as aforesaid admitted, at the said time of the admission of the said *Sylas* to the
same,

same, were and yet are of the clear yearly value of 28 *l.* and that the said earl and *W.* by the said *T. Smith* in the said full court of the manor aforesaid, held within that manor on the said 21st day of *April* in the first year of the reign of the said lord the now king aforesaid, he the said *T. Smith*, being then steward as aforesaid of the said earl and *W.* then lords of the manor aforesaid, of the said court of their manor aforesaid, after the said admission of the said *S. Titus* to the said two acres in which, &c. and the said other lands and tenements by the copy aforesaid made to the said *Sylas* granted, then and there did assess and appoint the sum of 35 *l.* for the fine for the said grant to the said *Sylas* of the said two acres of pasture with the appurtenances in which, &c. and the other lands and tenements aforesaid, by the copy aforesaid in form aforesaid granted, to be paid by him the said *Sylas* to the said earl and *W.* being as aforesaid lords of the manor aforesaid, on the first day of *May* then next ensuing at the porch of the parish church of *Bushey* aforesaid in the said county of *Hertford*; and that the said *Sylas* then and there, to wit, at the manor aforesaid, of all and singular the premisses had notice: and the said *W.* farther says, that the fine aforesaid for the lands and tenements by the copy aforesaid in manner and form aforesaid granted to the said *Sylas* was a reasonable fine; and that the said *S. Titus*, although he had notice from the said lords of the manor aforesaid, at the court aforesaid held as aforesaid at the manor

The yearly value.

The fine.

Forfeiture for
Non pay-
ment.

Denial to pay
an uncertain
fine is no
forfeiture.

Raym. 42.

Co. Ent. 647.

There ought
to be a de-
mand.

Cro. El. 779.

Cro. Jac. 617.

manor aforesaid, on the said 21st day of *April* aforesaid, of the premisses aforesaid, did not pay to the said earl and *W.* lords of the manor aforesaid, or either of them, the said sum of 35 *l.* for the fine aforesaid in form aforesaid assessed, on the said first day of *May* then next ensuing the admission of him the said *Sylas* at the said porch of the parish church of *Bushey* aforesaid, but the same 35 *l.* to the said earl and *W.* then and there absolutely denied and refused, and yet doth refuse, to pay; whereby the same *S. T.* hath forfeited to the said earl and *W.* being as aforesaid the lords of the manor aforesaid, whereof, *Ec.* all his customary right, estate, title and interest aforesaid, of and in the said two acres of pasture with the appurtenances in which, *Ec.* and the said other lands and tenements in the grant aforesaid specified; after which said forfeiture in form aforesaid made, and before the said time when, *Ec.* the said earl and *W.* being as aforesaid lords of the manor aforesaid, into the said two acres of pasture with the appurtenances in which, *Ec.* entered, and were and yet are thereof seised in their demesne as of fee; and because the cattle aforesaid after the entry aforesaid, to wit, at the said time when, *Ec.* were in the said two acres of pasture with the appurtenances in which, *Ec.* eating up the grass in the same then growing, and doing damage there, the same *W.* as before in his own proper right well avows, and as bailiff to the said earl well acknowledges the taking of the cattle aforesaid in the said place in which, *Ec.* and justly,
Ec.

Ec. so doing damage there : and this he is ready to verify : wherefore as before he prays judgment, and a return of the cattle aforesaid, together with his damages, costs and expences by him about his suit in this behalf sustained, according to the form of the statute in such case thereof lately made and provided, to be adjudged to him, Ec.

And the said *Sylas* by protesting that the sum aforesaid of 35 *l.* for the fine aforesaid for the said lands and tenements by the copy aforesaid to the said *Sylas* in manner and form aforesaid granted was not a reasonable fine, as the said *W.* above by pleading hath alledged, for plea the same *Sylas* says, that within the manor aforesaid there is, and from time immemorial hath been, such custom used and approved within that manor for all the time aforesaid, to wit, that every person or persons who shall be admitted tenant or tenants to any customary lands or tenements of that manor by copy of court-roll of that manor, hath and have been and ought to pay to the lord or lords of the same manor for the time being, for a fine for his or their admission to such customary lands or tenements, so much money as those lands or tenements were worth by the year at the time of such admission, and no more : and the said *Sylas* in fact says, that the said two acres of pasture with the appurtenances in which, Ec. together with the other lands and tenements in the same copy mentioned, and by the same copy to the said *Sylas* and his heirs granted,

21 H. 8. c. 19.

Protesting the fine is unreasonable, pleads a custom to pay a year's value only.

The lands worth but 28 *l.* per ann. which he offered to pay.

granted, and to which the said *Sylas* was as aforesaid admitted, at the time of the admission of the said *Sylas* to the same were worth, and yet are worth, by the year 28 *l.* and no more: and the same *Sylas* farther says, that at the time of his admission to the tenements aforesaid with the appurtenances, to wit, at the said court of the manor, held within that manor on the said 21st day of *April* in the first year aforesaid, he was ready and offered to pay to the said *W.* then one of the lords of that manor, being then and there present in his proper person, so much money as the said customary tenements with the appurtenances were worth by the year at the time of the admission of him the said *Sylas* to the same, to wit, 28 *l.* of lawful money of *England*; which said 28 *l.* the said *W.* then and there absolutely refused to receive or accept of the same *Sylas*: and this he is ready to verify: wherefore as before he prays judgment, and his damages by reason of the taking and unjust detention of the cattle aforesaid, to be adjudged to him, &c.

Demurrer.

And the said *W.* says, that the plea of the said *Sylas* above in rejoining pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said *W.* from having his avowry and cognisance aforesaid, and that he to that plea in manner and form aforesaid pleaded hath no necessity, nor is by the law of the land obliged, to answer: and this he is ready to verify: wherefore for want of a sufficient plea in this behalf, the same *W.* as before prays judgment, and a return of the cattle
afore-

aforesaid, together with his damages, costs and expences by him about his suit in this behalf sustained, according to the form of the statute in such case thereof lately made and provided, to be adjudged to him, &c. And for cause of demurrer in law to that plea, The cause. the same *W.* according to the form of the statute in such case thereof lately made and 27 El. c. 5. provided, sets down, and to the court here 4 A. c. 16. expresses this cause following, to wit, that the value of the land remains in estimation, and the custom aforesaid by the said *Sylas* above in pleading pretended and alledged is incertain, insufficient and void in law.

And the said *Sylas*, for that he hath above Joinder in demurrer. alledged sufficient matter in law in his plea aforesaid above in rejoining pleaded to preclude the said *W.* from having his avowry and cognisance aforesaid, which he is ready to verify, which said matter the said *W.* doth not deny, nor thereto in any wise answer, but altogether refuses to admit that averment, as before prays judgment, and his damages by reason of the taking and unjust detention of the cattle aforesaid, to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premisses before they give judgment thereon, day therefore is given to the parties aforesaid here until on the octave of *St. Hillary* to hear their judgment thereon, because the same justices here thereof not yet, &c. On which day here comes as well the said *Sylas* as the said *W.* by their attornies aforesaid; and hereupon the pre- Judgment for the plaintiff. misses being seen, and by the justices here more fully understood, it seems to the said *Q* justices

Inquiry
awarded.

justices here, that the said plea of the said *Sylas* above in rejoining pleaded, and the matter in the same contained, is sufficient in law to preclude him the said *W.* from having his avowry and cognisance aforesaid, as the said *Sylas* hath above alledged; wherefore the said *Sylas* ought to recover his damages against the said *W.* by reason of the taking and unjust detention of the cattle aforesaid: but because it is unknown what damages the said *Sylas* hath sustained by reason of the taking and unjust detention of the cattle aforesaid, the sheriff is commanded, that by the oath of good and lawful men of the county aforesaid he diligently inquire what damages the said *Sylas* hath sustained, as well by reason of the taking and unjust detention of those cattle, as for his costs and charges by him about his suit in this behalf sustained; and the inquisition which he shall thereof make, he certify here from the day of *Easter* in 15 days, under the seal, &c. and the seals, &c. On which day here comes the said *Sylas* by his attorney aforesaid; and the sheriff, to wit, *Joseph Edmunds*, esq; hath now returned here a certain inquisition taken before him at *Stevenage* in the county aforesaid on the 15th day of *April* last past, by the oath of 12, &c. whereby it is found that the said *Sylas* hath sustained damage by reason of the taking and unjust detention of the cattle aforesaid, besides his costs and charges by him about his suit in this behalf expended, to 4 *d.* and for those costs and charges to 6 *d.* Therefore it is considered, that the said *Sylas* do recover against the said *William*

Signed 3 May
2 Jac. 2.

William his damages aforesaid to 10 *d.* by the inquisition aforesaid in form aforesaid found, and also 9 *l.* 5 *s.* 2 *d.* to the same *Sylas*, at his request, for his costs and charges aforesaid, by the court here of increase adjudged; which said damages in the whole amount to 9 *l.* 6 *s.* And the said *William* in mercy, &c.

This judgment was affirmed on a writ of error.

AND the said *C.* by *R. B.* his attorney, comes and defends the force and injury when, &c. and well avows the taking of the said cattle in the said place where, &c. to be just, because he saith, that the said place doth, and at the said time when, &c. did contain in itself ten acres of land with the appurtenances; which ten acres of land with the appurtenances are, and at the time of taking the cattle aforesaid were the soil and freehold of the said *C.* and because the cattle aforesaid, at the said time when, &c. were in the said place, where feeding upon the grass there growing, and doing damage there, the said *C.* well avows the taking of the cattle aforesaid, in the said place where, &c. and justly, &c. for the damage there so done as aforesaid.

An avowry for damage-
seasant in the
defendant's
freehold.

And the said (*plaintiff*) saith, That the said *C.* ought not to avow the taking of the cattle aforesaid in the said place where, &c. to be just, because he saith, That the said ten acres with the appurtenances are, and at the said time when, &c. were the soil and freehold of the said (*plaintiff*) and

not the foil and freehold of the said C. as the said C. hath above alledged; and this he prays may be inquired of by the country; Pl. Gen. 574, and the said C. does likewise the same. 575.

Pippin and another at the suit of Maynard.

Trin. 12 W. 3. in C. B.

Declaration in replevin for the taking of the plaintiff's cattle.

The defendants plead property in a stranger, and for a return make cognisance as bailiffs to A. and B. for damage-feasant in their freehold.

AND the said *Edward* and *Sarah* by *W. L.* their attorney come and defend the force and injury when, &c. and say, that at the time when the taking of the cattle aforesaid is supposed to be, the property of those cattle was in one *Stephen Hewes*, who is now surviving and in full life, to wit, at *H.* aforesaid in the county aforesaid; without that, that the property of the cattle aforesaid at the time of the taking of them was in the said *Jonathan Maynard*, as he by his writ and declaration aforesaid above supposes: and this they are ready to verify: wherefore they pray judgment of the writ and declaration aforesaid, and a return of the cattle aforesaid, to be adjudged to them, &c. and to have a return of the cattle aforesaid, the same *Edward* and *Sarah*, as bailiffs of *A. B.* and *C. B.* well acknowledge the taking of the cattle aforesaid in the said place where, &c. called *Hebrom*, and justly, &c. because they say, that the same place called *Hebrom* contains, and at the said time when the taking

taking of the cattle aforesaid is supposed to be, did contain in itself 40 acres of pasture with the appurtenances in *Kingsthorpe* in the county aforesaid; which said 40 acres of pasture with the appurtenances are and at the said time when, &c. were the soil and freehold of the said *A. B.* and *C. B.* And because the cattle aforesaid at the said time when, &c. were in the said place called *Hebrom* aforesaid, eating up the grass there then growing, and doing damage there, the same *Edward* and *Sarah*, as bailiffs of the said *A. B.* and *C. B.* well acknowledge the taking of the cattle aforesaid in the said place where, &c. and justly, &c. so doing damage there: wherefore they pray judgment, and a return of the cattle aforesaid, to be adjudged to them, &c.

And the said *Jo. Maynard* says, that his writ and declaration aforesaid ought not to be quashed, because he says, that the property of the cattle aforesaid at the said time of the taking of them was in the said *Jonathan Maynard* in manner and form as he by his writ and declaration aforesaid hath above thereof alledged, to wit, at *Hebrom* aforesaid in the county aforesaid: and this he prays may be inquired of by the country: and the said *Edward* and *Sarah* likewise: therefore the sheriff is commanded that he cause to come, &c.

Repi' and issue on the property.

AND the said *R.* by *R. B.* his attorney, comes and defends the force and injury when, &c. and as to the taking of ten sacks of flour, part of the goods and chattels aforesaid, he the said *R.* saith, that the property

Where the defendant pleads property as to part, and *non cepit* as to the residue.

property of those goods and chattels at the said time when, &c. were in the said *R.* and not in the said *T.* as it is above supposed by the writ aforesaid; and this he is ready to verify; whereupon, as to the taking and detaining of those goods and chattels, the said *R.* prays judgment of the writ aforesaid, and that it may be quashed, &c. And as to the taking of the residue of the goods and chattels aforesaid, he the said *R.* pleads, that he did not take those goods and chattels, the said residue, as the said *T.* doth above complain against him; and thereof he puts himself upon the country; and the said *T.* does likewise the same.

And the said *T.* as to the said plea of the said *R.* above pleaded to quash the writ aforesaid, saith; that his said writ ought not to be quashed by reason of any thing above alledged, because he saith, that the property of the goods and chattels aforesaid above specified in the said plea, at the time of taking those goods and chattels, was in the said *T.* as he doth above suppose by his writ aforesaid; and this he prays may be inquired of by the country; and the said *R.* does likewise the same: therefore as well to try that issue, as the said other issue above joined, the sheriff is Pl. Gen. 602. commanded, that he cause to come here twelve, &c.

Note; Upon pleading non cepit on a claim of property, the defendant shall have his goods again. Salk. 581.

AND

AND the said *W.* by *H. S.* his attorney comes and defends the force and injury when, &c. and as bailiff of *M. G.* well acknowledges the taking of the cattle afore said in the said place where, &c. and justly, &c. because he says, that the same place, in which the taking of those cattle is supposed to be, contains, and at the said time when the taking of those cattle is supposed to be, did contain in itself 40 acres of land with the appurtenances in *L.* afore said, and that long before the said time when, &c. the said *F.* was seised of the said 40 acres of land with the appurtenances, whereof the place where, &c. is parcel, in his demesne as of fee, and the said 40 acres of land held of the said *M.* as of his manor of *B.* in the county of *S.* afore said, by fealty, suit of court, and the rent of 12 s. 6 d. every year, at the feast of *St. Michael* yearly to be paid; of which services the said *M.* was seised by the hands by the said *F.* as by the hands of his very tenant, to wit, of the fealty and suit of court, and of the rent afore said in his demesne as of fee; and because 5 l. 12 s. 6 d. of the rent afore said, for nine years ended at the feast of *St. Michael* in the 26th year of the reign of the said lord the now king, to the same *M.* at the said time when, &c. were in arrear and not paid, the same *W.* as bailiff of the said *M.* well acknowledges the taking of the cattle afore said in the said place where, &c. and justly, &c. for the same five pounds twelve shillings and six pence

Cognisance
as bailiff for
a rent-
charge.

so in form aforesaid being in arrear, as in parcel of the said land of the said *M.* in form aforesaid held, and within the fee, &c. And this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforesaid, to be adjudged to him, &c.

Bar, that he
was not seised,
&c.

And the said *F.* says, that the said *M.* was not seised of the services aforesaid by the hands of him the said *F.* as by the hands of his very tenant, as the said *W.* hath above alledged: and this he is ready to verify: wherefore for that the said *W.* the taking of the cattle aforesaid in the said place where, &c. hath above acknowledged, the same *F.* prays judgment, and his damages by reason of the taking and unjust detention of the cattle aforesaid, to be adjudged to him, &c.

Issue thereon.

And the said *William* (as before) says, that the said *M.* was seised of the services aforesaid by the hands of the said *F.* as by the hands of very tenant, as he hath above alledged: and of this he puts himself upon the country: and the said *F.* likewise, &c. Therefore the sheriff is commanded, that he cause to come here from the day of the Holy *Trinity* in three weeks 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Liddiard and Creswicke.

M. 33 C. 2.

Avowry for
damage-fea-
sant in his
freehold.

AND the said *Francis* by *Andrew Innys* his attorney comes and defends the force and injury when, &c. and well avows

avows the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. because he says, that the same place in which, &c. is known, and at the said time when, &c. and long before was known, as well by the name of *Hannam's Common*, as by the name of *Hannam's Heath*, and contains, and at the said time when, &c. contained in itself 50 acres of pasture with the appurtenances in the said parish of *Bitton* in the said county of *Gloucester*, which said 50 acres of pasture with the appurtenances are, and at the said time when, &c. were the soil and freehold of him the said *Francis*; and because the cattle aforesaid at the said time when, &c. were in the said place in which, &c. eating up the grass there then growing, and doing damage there, the same *Francis* in his own proper right well avows the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. so doing damage there: and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforesaid, together with his damages, costs and charges, in this behalf sustained, according to the form of the statute in such case lately made and provided, to be adjudged to him, &c. 21 H. 8. c. 19.

And the said *John Liddiard* says, that the said *Francis*, for the reason before alleged, the taking of the cattle aforesaid in the said place in which, &c. ought not to avow just, because by protesting that the same place in which, &c. at the said time when, &c. was not the freehold of him the said *Francis*, as is above supposed, for

Bar, That
T. M. was
seised in fee,
and demised
to W. L. and
the plaintiff
for their lives.

for plea the same *John* says, that long before the said time of the taking of the cattle aforesaid in the said place in which, &c. to wit, on the 21st day of *August* in the 10th year of the reign of the lord *James*, late king of *England*, &c. *Theodore Newton*, knt. was seised in his demesne as of fee of and in one messuage and 47 acres and a half of land arable, meadow and pasture, with the appurtenances in *Hannam* and *Bitton* in the parish of *Bitton* aforesaid in the county aforesaid; and being so thereof seised, afterwards, to wit, on the said 21st day of *August* in the 10th year of the reign of the lord *James*, late king of *England* aforesaid, at *Bitton* aforesaid in the county aforesaid, demised the messuage aforesaid and the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, to *William Liddiard* and *Katherine* his wife, and him the said *John Liddiard*; to hold to the said *William Liddiard* and *Katherine* his wife for and during the term of their natural lives, and the natural life of the longer liver of them, and after their decease the remainder thereof to the said *John Liddiard* for and during the term of the natural life of him the said *John*: by virtue of which said demise the same *William* and *Katherine* afterwards of the said messuage and the said 47 acres and a half of land arable, meadow and pasture with the appurtenances, were seised in their demesne as of freehold for the term of their lives and the life of the longer liver of them, the remainder thereof after their decease to the said *John* for the term of his life

life so as aforesaid belonging; and the said *William* and *Katherine* being so thereof seised afterwards, to wit, on the first day of *September* in the 32d year of the reign of the lord *Charles* the second, now king of *England*, &c. at *Bitton* aforesaid in the county aforesaid died thereof seised; after the death of which said *William* and *Katherine* he the said *John*, as in his remainder aforesaid, afterwards, to wit, on the said first day of *September* in the 32d year of the reign of the lord *Charles* the second, now king of *England*, &c. at *Bitton* aforesaid in the county aforesaid into the messuage aforesaid and the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, by virtue of the demise aforesaid entered, and was and is yet thereof seised in his demesne as of freehold for the term of his life: and the same *John* farther says, that at the time of the demise aforesaid made, he the said *Theodore Newton*, and all those whose estate the same *Theodore* then had of and in the said messuage and 47 acres and a half of land arable, meadow and pasture, with the appurtenances, have had, and for time out of mind have been accustomed to have, for themselves, their farmers and tenants, of the said messuage and the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, common of pasture in the said place in which, &c. for all their commonable cattle in and upon their tenements aforesaid with the appurtenances levant and couchant every year at all times of the year, as to their tenements aforesaid

The entry of
the plaintiff.

Prescription
for common.

A P P E N D I X.

belonging and appertaining: by reason whereof the said *John* before the said time when, &c. to wit, on the 9th day of *September* in the 33d year of the reign of the said lord the now king, the cattle aforesaid in the declaration aforesaid above specified, being then the proper cattle of him the said *John*, upon the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, then levant and couchant, into the said common called *Hannam's Common*, being the place in which, &c. put, as he well might, to use his common aforesaid; and the said *Francis* the said cattle, to wit, the said 30 sheep so in the said place in which, &c. put, feeding on the grass there growing, and using the common of pasture of him the said *John* there, afterwards at the said time when, &c. to wit, on the 10th day of *September* in the 33d year aforesaid, at *Bitton* aforesaid in the said place in which, &c. commonly called *Hannam's Common*, took and them unjustly detained, against surety and pledges, in manner and form as the said *John* above against him complains: and this the same *John* is ready to verify: wherefore he prays judgment, and his damages by reason of the taking and unjust detention of the cattle aforesaid, to be adjudged to him, &c.

Repl. That it
is his free-
hold.

And the said *Francis Creswicke* as before says, that the said 50 acres of pasture, called *Hannam's Common*, otherwise *Hannam's Heath*, are, and at the said time when, &c. were the soil and freehold of him

him the said *Francis*; and because the cattle aforesaid at the said time when, &c. were in the said place in which, &c. eating up the grass then there growing, and doing damage there, the said *Francis* the same cattle took, as he hath above alledged; without that, that the said *Theodore*, and all those whose estate the same *Theodore* then had of and in the said messuage and 47 acres and a half of land arable, meadow and pasture, with the appurtenances, have had, and from time out of mind have been accustomed to have, for themselves, their farmers and tenants, of the said messuage and the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, common of pasture in the said place in which, &c. for all their commonable cattle in and upon their tenements aforesaid with the appurtenances, levant and couchant every year at all times of the year, as to their tenements aforesaid belonging and appertaining, as the said *John* in bar to the avowry aforesaid hath above alledged: and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforesaid, together with his damages, &c. to be adjudged to him, &c.

And the said *John Liddiard* as before Issue on the traverse. says, that the said *Theodore Newton*, and all those whose estate the same *Theodore* then had in the said messuage and 47 acres and a half of land arable, meadow and pasture, with the appurtenances, have had, and from time out of mind have been accustomed to have, for themselves, their farmers

farmers and tenants of the said messuage and the said 47 acres and a half of land arable, meadow and pasture, with the appurtenances, common of pasture in the said place in which, &c. for all their commonable cattle in and upon their tenements aforesaid with the appurtenances, levant and couchant every year at all times of the year, as to their tenements aforesaid belonging and appertaining, in manner and form as he the said *John Liddiard* hath above alledged: and this he prays may be inquired of by the country: and the said *Francis* likewise: therefore the sheriff is commanded, that he cause to come before the lord the king in the octave of St. *Hilary* wheresoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid, &c.

A plea in bar to an avowry, that the plaintiff tendered to the defendant sufficient amends for the damage-seasant.

AND the said *A.* pleads, that the said *C.* by reason of any thing above alledged, ought not to avow the taking of the cattle and chattels aforesaid in the said place wherein, &c. to be just, (or *ought not to justify*) because he saith, that after the said *C.* had taken the cattle and chattels in the place aforesaid, (to wit, [on such a day and year] at *W.* aforesaid, he the said *A.* tendered to the said *C.* 6 s. 8 d. which were sufficient amends for the damages done to him in the said place wherein, &c. which 6 s. 8 d. the said *C.* then and there totally refused to accept, and unjustly detained the cattle and chattels aforesaid, against sureties and pledges, &c. until,

until, &c. as he the said *A.* doth above complain against him; and this he is ready to verify; wherefore, inasmuch as the said *C.* doth above acknowledge the taking of the said cattle and chattels in the said place wherein, &c. he the said *A.* prays judgment and his damages, occasioned by the taking and unjustly detaining of the cattle and chattels aforesaid, to be adjudged to him, &c.

And the said *C.* protesting, that the 6*s.* 8*d.* were not sufficient amends for the damages aforesaid done to the said *C.* in the said place where, &c. for plea saith, that the said *A.* did not tender to the said *C.* the said 6*s.* 8*d.* for the damage done in the said place where, &c. as the said *A.* hath above alledged; and this he is ready to verify; wherefore he prays judgment, and a return of the cattle and chattels aforesaid, to be adjudged to him, &c.

And the said *A.* as before saith, that he did tender to the said *C.* the said 6*s.* 8*d.* for the said damages done him in the said place where, &c. as he hath above alledged; and this he prays may be inquired of by the country.

Defendant protesting, that the 6*s.* 8*d.* tendered was not a sufficient amends, for plea denies the tender.

Plaintiff rejoins, that he did tender the 6*s.* 8*d.* and issue.
Pl. Gen. 596, 597, 598.

AND the said *H.* by *J. T.* his attorney comes and defends the force and injury when, &c. and pleads, that in the said county of *D.* there is a place called *M. D.* and another place called *M.* in *E.* and another place called *M. J.* in *E.* aforesaid; without that, that in the said vill of *K.* there is, or at the said time when, &c. was any place called or known by

An avowry, where the defendant traverseth the place, and saith, that there are several places known by the same name, but that they

are differently
to be describ-
ed, they hav-
ing different
additions.

by the name of *M.* only, and that he, at the said time when the said cattle is supposed to have been taken, took the said six oxen and eight cows above specified in the said declaration, and also an horse of the said (*plaintiff*) in the said place called *M. D.* without that, that he took the said six oxen and eight cows at *K.* aforesaid, in the said place called *M.* only; as the said (*plaintiff*) doth above suppose by his said declaration, of all and singular which cattle aforesaid, one Sir *P. E. Knt.* then sheriff of the said county of *D.* granted a replevin to the said (*plaintiff*) upon his plaint thereon; and this he is ready to verify; wherefore he prays judgment of the declaration aforesaid, and to have a return of all and singular the cattle aforesaid; and the said (*defendant*) as bailiff to *J. B.* well acknowledges the taking of the said six oxen, eight cows, and one horse, in the said place called *M. D.* and justly, &c. because he saith, [*so go on with the avowry, concluding with a prayer of a return*], &c.

This precedent is agreeable to the case reported in Salk. 93, 94. where the defendant pleaded, that the cattle were taken in another place; without that, &c. and it was held by the court that this was not enough, but the defendant must go further, and make an avowry for a returno habendo, yet such avowry is only a suggestion to bring him within the statute of H. 8. for damages; before that statute no damages were given, and without such a suggestion,
he

7 & 21 H. 8.
cap. 19.

he is not within that statute, and it being only for this particular purpose, is not traversable.

AND the said *Richard Poole* pleads, Plea: that the said *Thomas Longuevill* ought not to avow the taking of the cattle aforesaid in the said place in which, &c. to be just, for the reason above alledged, nor ought they the said *Anthony, William* and *Thomas Leadale*, as bailiffs to the said *Thomas Longuevill*, to acknowledge the said taking of the cattle aforesaid in the said place in which, &c. to be just, for the same reason, because he saith, that he the said *Richard Poole*, at the said time when, &c. was, and long before had been possessed of and in a close of pasture in *Burne* aforesaid, near adjoining to the said place called *Parks*, in which, &c. and further, the said *Richard Poole* saith, that the said *Thomas Longuevill*, and all those whose estate he the said *Thomas Longuevill* now hath, and at the said time when, &c. had, of and in the close aforesaid called *Parks*, in which, &c. for so long a time as there is no remembrance of any man to the contrary, have made and repaired, and have been used and accustomed to make and repair, the hedges and fences between the said close called *Parks*, in which, &c. and the said close of pasture of the said *Richard*; and the said *Richard* further saith, that before and at the time when, &c. the hedges and fences between the said close in which, &c. and the said close of pasture of the said *Richard Poole*

That plaintiff at the time when, &c. and long before, was possessed of a close adjoining to the place in which, &c. and that *T. L.* the principal defendant, and all those, &c. time out of mind were used to repair the fences of the *locus in quo*, &c. which divided the same from the plaintiff's close.

That those fences before the time when, &c. were out of repair.

R

were repair.

By reason
whereof
plaintiff's
cattle escaped
into the *locus*
in quo.

And before
the plaintiff
had or could
have any no-
tice thereof,
defendants
took the cat-
tle.

Plaintiff
prays judg-
ment, and
his damages.

2 Sarrd. 289,
290.
2 Keb. 660,
680, 709.
2 Danv. 642.
Pl. 57.
2 Vent. 50.
3 Lev. 260.
Lutw. 1165,
1577, 1578.

were broken, laid open, and in great de-
cay for want of repairing them, by which
means the cattle of the said *Richard* being
thentofore put into his said closes of pas-
ture, afterwards, and before the said time
when, &c. that is to say, upon the 27th
day of *February* in the 18th year afore-
said, escaped out of the close of the said
Richard, and by the hedges and fences
aforesaid being broken, entred into the said
close in which, &c. and there remained
until they the said *T. L. A. W.* and *T.*
afterwards, and before that the said *Richard*
had or could have any notice of the said
cattle's being in the said place in which,
&c. (to wit) at the said time when, &c.
took the said cattle in the said place in
which, &c. and unjustly detained them
against sureties and pledges, in the man-
ner and form as the said *Richard* doth
above complain thereof against them; and
this he is ready to verify; wherefore, and
inasmuch as the said *T. A. W.* and *J.*
do above acknowledge the taking and
detaining of the cattle aforesaid, he the
said *R. P.* prays judgment, occasioned by
the taking and unjustly detaining of the
cattle aforesaid, to be adjudged to him,
&c.

To this plea in bar of the avowry the
defendant demurred, and the plaintiff
joined in demurrer, and judgment was
given in the common pleas for the de-
fendant, that the plaintiff's plea in bar
was not good; upon which a writ of er-
ror was brought. The counsel for the
plaintiff in error argued, that the judg-
ment

ment was erroneous, and that the cattle could not be distrained, because they escaped from the default of fences, which upon the face of the record ought to have been repaired by the defendant *Longueville*. Notwithstanding this, the judgment was affirmed. The court relied much upon the case in 10 H. 7. 21. B. where it is said, that if the cattle escape into any land, and the lord distrains them, such distress is good, and that it is not material whether they were levant and couchant or not. But *Saunders* in the report of this case takes notice, that this case, in his opinion, was hard to be maintained; for, says he, there is a vast difference between a lord's distraining within his seignior and a lessor's distraining for rent reserved upon his own lease; for the lord hath nothing to do with the land or the fences, and so it is not material to him whether the fences are in repair or not: but it is otherwise of a lessor, for he himself ought to repair the fences, or to take care that his tenant repairs them; otherwise he would take an advantage of his own wrong, which would be inconvenient. This distinction (says he) seems to be warranted by the books of *Mich.* 14 & 15 *El.* *Dyer* 317, 318. 22 *Ed.* 4. 49. b. 7 H. 7. 1. 15 H. 7. 17. But if the cattle escape into the land without any default of the fences, or that the tenant of the land is not bound to repair those fences, for default whereof the cattle escape and are distrained, it is not material to the lord or the lessor, whether they

1 Saund. 226,
227.
Co. Lit. 161.
2 Inst. 192.
1 Rol. Abr.
671.
Plowd. 38.
2 Edw. 4. 6.
2 Leon. 7.
3 Cro. 549,
596, 628.
Dyer 322,
372.
Fitz. Avow.
219.
11 H. 7. 48.
15 H. 7. 17.
Bio. Distress
(43, 57.)
Trespas 181.
43 Ed. 3. 32.
T. Raym. 39,
398.
1 Sid. 70.
2 Mod. 316,
317.
3 Mod. 112.
2 Lev. 22.
5 Mod. 147,
148.

are levant and couchant or not. *Note*; the case of *Reynolds* and *Oakley*, reported in 1 *Brownl.* 170. and in *Hob.* 265. seems to favour this opinion of *Saunders*. There the defendant avowed for rent reserved upon a lease for life, and the plaintiff in his plea in bar to the avowry shews, that the place in which, &c. did adjoin to the plaintiff's close, and that the cattle, against the plaintiff's will, did escape into the other close, and that he did presently follow the cattle, and before he could drive them out of the close the defendant distrained them. The court held, that inasmuch as the beasts were always in the plaintiff's possession, and in his view, the defendant could not distrain those cattle as the cattle of a stranger; but if he had permitted the beasts to have remained there by any space of time, tho' they had not been levant and couchant, the lessor might have distrained them as the beasts of a stranger. In the report of this case in *Hob.* the opinion of the court does not appear, for it is there said, the case had been somewhat better, if the tenant ought to maintain the fences.

Eldridge and Burfield.

Non suit in
replevin for
not declaring.

Sussex, to wit. **T**homas *Eldridge* was summoned to answer to *Robert Burfield* in a plea, why he took seven cows of him the said *Robert* and them unjustly detained, against surety and pledges, &c. And whereon the same *Thomas* in his proper

proper person hath offered himself the fourth day against the said *Robert* in the plea aforesaid; and the same *Robert*, although solemnly called, doth not come, but hath made default: therefore it is considered, that the said *Thomas Eldridge* do go thereof without day, &c. and that the said *Robert* and his pledges to prosecute, to wit, *John Doe* and *Richard Roe*, be in mercy, &c.

2. The names of the pledges, &c. and that the said *Thomas* have a return of the cows aforesaid, &c. Afterwards, to wit, on . . . day next after

in this same term before the lady the queen at *Westminster* comes here into court the said *Robert Burfield* by *A. B.* his attorney, and by the statute, &c. prays the writ of ^{13 E. 1. c. 2.} the lady the queen of second deliverance of the cattle aforesaid; and to him it is granted, returnable here from the day of wheresoever, &c.

A N N E, &c. To the sheriff of *Mid-*
dlesex, greeting: Whereas *John S.* late
of the parish of *St. Clement Danes* in your
county, Esq; was summoned to be in our
court before us to answer to *William P.* Esq;
in a plea, why on the 14th day of *October*
in the first year of our reign, at the
parish of *St. Clement Danes* in your county,
in a certain place there called a chamber
in *Devereux Court*, he took the goods and
chattels of him the said *William*, to wit,
one bed, one bedstead, one bolster, one
pillow, four curtains valance, two blan-
kets, one quilt, one chest of drawers, 20
books, one looking-glass, one large brush,

Inquiry of
damages in
replevin
where judg-
ment was
given for the
defendant on
demurrer.

one large trunk, and four chairs, and unjustly detained them, against surety and pledges, until, &c. And the said *John S.* came and in our same court before us alledged and said, that the said *William* ought not to have or maintain his action aforesaid thereof against him, because he said, that as to the said one bed, one bedstead, one bolster, one pillow, four curtains valance, two blankets, one quilt, one looking-glass, and 10 books, parcel of the goods and chattels aforesaid in the declaration aforesaid mentioned, the property of those goods and chattels at the said time of the taking of the same was in him the said *John*; without that, that the property of those goods and chattels at the said time of the taking of the same was in the said *William*, as by the declaration aforesaid was above supposed: and this he was ready to verify: and as to the said one chest of drawers, one large brush, one large trunk, 10 other books, and four chairs, the residue of those goods and chattels last mentioned, the property of the same goods and chattels was in one *Richard F.* without that, that the property of the residue of those goods and chattels was in the said *William*, as by the declaration aforesaid was above supposed: and this he was ready to verify and prove, &c. wherefore he prayed judgment if the said *William* ought to have or maintain his action aforesaid thereof against him, &c. and he prayed also a return of all and singular the goods and chattels aforesaid,

togeth-

together with his damages, costs and charges by him about his suit in that behalf expended, to be adjudged to him, &c. And the said *William* said, that the plea aforesaid by the said *John* above pleaded, and the matter in the same contained, were insufficient in law to preclude him the said *William* from having his action aforesaid against the said *John*, and that he to that plea in manner and form aforesaid pleaded had no necessity, nor was by the law of the land obliged in any manner to answer: and this he was ready to verify: wherefore, for want of a sufficient answer in this behalf, he the same *William* prayed judgment and his damages, by reason of the caption and unjust detention of the goods and chattels aforesaid, to be adjudged to him, &c.

Demurrer.

And the said *John* said, that the plea aforesaid by him the said *John* in manner and form aforesaid above pleaded, and the matter in the same contained, were good and sufficient in law to preclude the said *William* from having his action aforesaid against him the said *John*; which said plea, and the matter in the same contained, he the same *John* was ready to verify and prove, as the court, &c. And because the said *William* did not answer to that plea, nor hitherto in any wise deny it, he the same *John* (as before) prayed judgment, and a return of all and singular the goods and chattels aforesaid, together with his damages, &c. to be adjudged to him, &c. And it was thereupon in such

Joinder.

Judgment for
the defen-
dant.

manner proceeded in our same court before us, that it was considered, that the plea aforesaid by him the said *John* above pleaded, and the matter in the same contained, were good and sufficient in law to preclude the said *William* from having his action aforesaid against him the said *John*: it was also considered, that the said *William P.* should take nothing by his writ aforesaid, but for his false claim should be in mercy, &c. and that the said *John* ought to recover his damages against the said *William* by reason of the caption and unjust detention of the goods and chattels aforesaid: therefore we command you, that by the oath of 12 good and lawful men of your bailiwick you diligently inquire what damages the same *John* hath sustained, as well by reason of the caption and unjust detention of the goods and chattels aforesaid, as for his costs and charges by him about his suit in this behalf expended; and the inquisition which you shall thereof take send to us on wheresoever we shall then be in *England*, under your seal and the seals of those by whose oath you shall take that inquisition, together with our writ to you therefore directed. Witness *J. Holt*, Knt. at *Westminster* 12th day of *February* in the second year of our reign.

GEORGE,

GEORGE, &c. To the sheriff of *Sussex*, greeting: Whereas *William A.* was summoned to be in the court of the lady *Anne*, late queen of *Great Britain*, &c. before the late queen herself, to answer to *Matthew G.* in a plea, why the said *William* on the 9th day of *April* in the 12th year of the reign of the said lady the queen, at *Chalvington* in the county aforesaid, in a certain place there called the *Croft*, took the cattle, to wit eight ewes and six lambs, of him the said *Matthew*, and them unjustly detained, against surety and pledges, &c. And the same *William* in the same court before the said lady the late queen appearing, for a certain cause by him alledged said, that he took the cattle aforesaid at *Ripe*, otherwise *Cocklington*, in the county aforesaid; without that, that he took the cattle aforesaid at *Chalvington* in the county aforesaid, as the said *Matthew* by his declaration aforesaid had above alledged: and this he was ready to verify: wherefore he prayed judgment of the writ aforesaid, and that the said writ and declaration, &c. and to have a return of the cattle aforesaid; the same *William*, as bailiff of *Robert R.* well acknowledged the taking of the cattle aforesaid in the said place to be just, &c. because he said, that the same place, called the *Cony Earths*, contained in itself five acres of land with the appurtenances in the said parish of *Ripe*, otherwise *Cocklington* in the county aforesaid, of which said five acres of land with the appurtenances the same *Robert R.* before the said time when, &c.

An inquiry of the arrear of rent and value of the cattle distrained on a nonsuit in a replevin.

3 Leon. 213.

was

was seised in his demesne as of fee; and being so thereof seised, before the said time when, &c. to wit, on the 18th day of *March* in the 11th year of the reign of the said lady the late queen, at the parish of *Semiston* in the county aforesaid, the said *Robert R.* demised to one *Matthew G.* the younger the said five acres of land with the appurtenances, by the name of all those two pieces or parcels of pasture, called the *Cony Earths*, with the appurtenances, lying and being in *Ripe*, otherwise *Cocklington* aforesaid; to have and to hold the said five acres of land with the appurtenances whereof, &c. to the same *Matthew G.* from the feast of the annunciation of the Blessed Virgin *Mary* then next ensuing unto the end and term of one whole year, and so from year to year as long as both parties should please; yielding and paying therefore the yearly rent or sum of 50 s. of lawful money of *Great Britain*, at the two most usual feasts or terms in the year, to wit, on the feast of *St. Michael* the Archangel and the annunciation of the Blessed Virgin *Mary*, by even and equal portions to be paid: by virtue of which demise the same *Matthew G.* the younger, afterwards, and before the said time when, &c. to wit, on the 26th day of *March* in the year last aforesaid, into the said five acres of land with the appurtenances whereof, &c. entered, and was thereof possessed; and he the said *Matthew G.* the younger being so thereof possessed, and the said *Robert* of the reversion of the said five acres of land with the appurtenances being seised in his demesne

mesne as of fee; and because 50 s. of the rent aforesaid, for one year ended on the feast of the annunciation of the Blessed Virgin *Mary* in the 12th year of the reign of the said late queen, to the same *Robert* after that feast and at the said time when, &c. were in arrear and unpaid, the same *William*, as bailiff of the said *Robert*, well acknowledged the taking of the cattle aforesaid in the said place in which, &c. as in parcel of the tenements aforesaid with the appurtenances whereof, &c. to the same *Matthew G.* in form aforesaid demised, and justly, &c. for the said 50 s. rent to the said *Robert* in form aforesaid being in arrear, &c. And this he was ready to verify: wherefore he prayed judgment, and a return of the cattle aforesaid, together with his damages, costs and charges in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, &c. And after- Demise of the queen.
wards the said lady the queen departed this life: and upon this the said *Matthew* prayed leave of our court before us until on the morrow of the holy *Trinity*, wheresoever, &c. to plead in bar to the cognisance aforesaid; and he had, &c. The same day was given to the said *William*, &c. On Nonsuit.
which day came the said *William* into our same court before us at *Westminster*; and the said *Matthew*, although solemnly called, did not come, nor farther prosecute his writ aforesaid: therefore it is considered, that the said *Matthew* take nothing by his writ aforesaid, but be in mercy for his false claim thereof, and that the said *William* do

Inquiry. go thereof without day, &c. Therefore we command you, that, according to the form of the statute in such case lately made and provided, by the oath of 12 good and lawful men of your county you diligently inquire how much of the yearly rent aforesaid at the said time of the taking and distraining of the goods and chattels aforesaid was in arrear and unpaid, and how much the goods and chattels aforesaid so as aforesaid taken and distrained were worth, according to the true value of the same; and the inquisition which, &c send to us from the day of *St. Michael* in three weeks under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness *T. Parker*, knt.

The execution of this writ appears in a certain schedule to this inquisition annexed.

The return. *Suffex*, to wit. **A**N inquisition indented taken at *Eastgrinstead*, in the county aforesaid on the fifth day of *August*, &c. In witness whereof as well I the sheriff as the jurors aforesaid have to this inquisition set our seals the day, year and place abovesaid.

James Smith, bart. sheriff.

The rent in arrear 8 *l*.

The value of the goods 8 *l*.

For costs, according to the form of the statute 9 *l*.

8 December 1715.

James

JAMES, &c. To the sheriff of *Gloucester*, greeting: Whereas *John W.* gent. lately in our court before us at *Westminster*, by our writ impleaded *Francis C.* esq; *Henry C.* the elder, *George T.* *William B.* and *Henry C.* the younger, in a plea, why they took the cattle of him the said *John*, and them unjustly detained, against surety and pledges, &c. And thereupon the same *John* by *Thomas E.* his attorney complained, that the said *Francis*, *Henry C.* the elder, *George*, *William*, and *Henry C.* the younger, on the first day of *September* in the 36th year of the reign of the lord *Charles* the second, late king of *England*, &c. at the parish of *St. Philip* and *James* in your county aforesaid, in a certain place there called *Conham*, took the cattle, to wit fifty sheep, of him the said *John*, and them unjustly detained, against surety and pledges, until &c. whereby he then said that he was prejudiced, and had damage to the value of 20*l.* And therefore he then produced the suit, &c. And thereupon the said *Francis*, *Henry*, *George*, *William* and *Henry*, by *C. H.* their attorney came and defended the force and injury when, &c. And the said *Francis* in his own right well avowed, and as bailiff of *Thomas S.* and *Stephen C.* gent. well acknowledged, and the said *Henry*, *George*, *William* and *Henry*, as bailiffs of the said *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforesaid, in the said place in which, &c. and justly, &c. because they said that long before the said time when, &c. the lord

An inquiry of damages in replevin after judgment on demurrer.

Avowry and cognisance.

Charles

Charles the second, late king of *England*, &c. was seised of and in the forest or chase called *Kingswood*, with the appurtenances in your county aforesaid, in his demesne as of fee in the right of his crown of *England*; and that the said place in which, &c. is and at the said time when, &c. and also for time immemorial was within the forest aforesaid, and parcel of the same forest, and that the same late king being so seised before the said time when, &c. by indenture made at *Westminster* in the county of *Middlesex*, on the 20th day of *January* in the 21st year of the reign of the same late king, between the same late king of the one part, and one *Baynham T. knt.* and bart. of the other part, which said indenture, sealed under the great seal of *England*, the same *Francis, Henry, George, William* and *Henry* then in court produced, the date whereof is the day and year last aforesaid, the same late king *Charles* the second, for the considerations in the same indenture mentioned, with the advice of two of the commissioners of the treasury of the same late king, granted, demised and to farm let to the said *Baynham* the forest or chase aforesaid, with the appurtenances, by the name of all that forest or chase called *Kingswood*, lying and being in or near the parish of *St. Philip and James* in the city of *Bristol* in the parish of *Bitten Mangerfield*, otherwise *Mangerfield Stapleton*, otherwise *Stableton, Hambrooke* and *Westanham* in your county, containing by estimation 3432 acres of waste land, more or less, and extending on fundry other lands, as well waste as inclosed, in or near the parishes aforesaid, or

some of them, together with all bucks, does and other beasts then being within the limits of the forest or chase aforesaid, and all liberties, franchises, privileges, rights and appurtenances to the same forest or chase belonging, incident or appendant, or within the forest or chase then before had, used or enjoyed in the times of the lady *Elizabeth*, late queen of *England*, or of the lord *James*, late king of *England*, and the lord *Charles* the first, late king of *England*, or any of them, by reason or pretence of the said forest or chase, or the liberties and franchises of the same, to have and to hold the said forest, chase, franchises, liberties, privileges, and all and singular other the premisses in the same indenture mentioned and intended to be thereby granted, with their and every of their appurtenances to the said *B. T.* his executors, administrators and assigns, from the feast of *St. Michael* the archangel then last past, for and during the term of 60 years from thence next ensuing, fully to be compleat and ended: and the said late king *Charles* the second willed, and by the same indenture for himself, his heirs and successors, gave and granted to the said *Baynham*, his executors, administrators and assigns, full power and authority to replenish the forest or chase aforesaid with deer, and by all lawful ways and means to erect lodges for the keepers, and to hinder and suppress purprestures, assarts and nufances there, of what nature or kind soever, and also to preserve the covert and vert for the safety and preservation of the beasts aforesaid, as
by

by the indenture aforesaid, among other things, is more fully manifest; by virtue of which said demise the said *Baynham* into the forest or chase aforesaid, with the appurtenances, entered, and was thereof possessed, and being so thereof possessed, the same *Baynham* afterwards, and before the said time when, &c. to wit, on the first day of *March* in the 32d year of the reign of the said lord king *Charles* the second, at the parish of *St. Philip and James* aforesaid, assigned to one *Mary B.* the premisses aforesaid, with the appurtenances, and all his right, title and interest of and in the same, to have and to hold to the same *Mary*, her executors and assigns, during all the residue of the said term of 60 years then to come and unexpired, by virtue of which said assignment the same *Mary* into the premisses aforesaid entered and was thereof possessed; and being so thereof possessed, the said *Mary* afterwards, and before the said time when, &c. to wit, on the third day of *January* in the 33d year of the reign of the said lord king *Charles* the second, at the parish of *St. Philip and James* aforesaid, assigned to the said *Francis, Thomas and Stephen*, the premisses aforesaid, with the appurtenances, and all her right, title and interest of and in the same, to have and to hold to the same *Francis, Thomas and Stephen*, during all the residue of the said term of 60 years then to come and unexpired, by virtue of which said assignment the same *Francis, Thomas and Stephen*, into the premisses aforesaid, with the appurtenances, entered, and were and yet are there-
of

of possessed; and because the cattle aforesaid at the said time when, &c. were in the said place in which, &c. eating up the grais there growing, and doing damage there, the said *Francis* in his own right well avowed, and as bailiff of the said *Thomas* and *Stephen* acknowledged, and the said *Henry*, *George*, *William* and *Henry*, as bailiffs of the said *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. so doing damage there: and this they were ready to verify: wherefore they prayed judgment, and a return of the cattle aforesaid, together with their damages, costs and charges in that behalf expended, according to the form of the statute in such case made and provided, to be adjudged to them, &c. And the said *John W.* thereto said, that the said *Francis*, *Henry*, *George*, *William* and *Henry*, for the reason before alledged, ought not as bailiffs of the said *Thomas S.* and *Stephen C.* to acknowledge, nor the said *Francis* in his own right to avow the taking of the cattle aforesaid in the said place in which, &c. just; because by protesting Plea. that the said lord king *Charles* the second never was seised of the soil or land of the forest or chase of *Kingswood* aforesaid, for plea the same *John W.* said, that long before the said time of the taking of the cattle aforesaid made, and also before the said time when it is supposed that the said late king *Charles* the second was seised of the forest or chase aforesaid, to wit, on the third day of *April* in the 23d year of the

S

reign

reign of the late king *Charles* the first, *John W.* the elder, father of him the said *John W.* was seised of the manor of *St. Lawrence* within the parish of *St. Philip* and *James*, with the appurtenances, in your county aforesaid, whereof the said place in which, &c. is and at the said time when, &c. and also for time immemorial was parcel, in his demesne as of fee; and being so thereof seised, the same *John W.* the elder afterwards and before the said time when, &c. at *Conham* aforesaid died of such his estate thereof seised, after whose death the said manor with the appurtenances, whereof the said place in which, &c. is parcel, descended to the said *John* as son and heir of him the said *John*, by reason whereof the said *John* the son afterwards and before the said time when, &c. into the said manor with the appurtenances entered, and at the time of the taking of the cattle aforesaid was and yet is seised thereof in his demesne as of fee, and being so thereof seised, the same *John* before the said time when, &c. put his cattle aforesaid into the said place in which, &c. to feed on the grass there then growing, until the said *Francis*, *Henry*, *George*, *William* and *Henry* on the day and year in the declaration aforesaid specified at *Conham* aforesaid, took the cattle aforesaid of him the said *John*, and unjustly detained them against surety and pledges, until, &c. as he above against them complained: and this he was ready to verify: wherefore he prayed judgment and his damages, by reason of the caption and unjust detention of those cattle, to be adjudged
to

to him, &c. And the said *Francis, Henry*, Demurrer.

George, William and *Henry* thereupon said, that the said plea of the said *John* above in bar of the avowry and cognisance aforesaid pleaded, was insufficient in law to maintain him the said *John* to have his action aforesaid against them the said *Francis, Henry, George, William* and *Henry*, and that they to that plea in manner and form aforesaid pleaded had no necessity, nor were by the law of the land obliged in any manner to answer: and this they were ready to verify: wherefore for want of a sufficient plea in this behalf they prayed judgment, and a return of the cattle aforesaid, together with their damages in this behalf sustained, to be adjudged to them, &c.

And for cause of demurrer in law in this behalf, the same *Francis, Henry, George, William* and *Henry* did set down, and to

The causes.
27 El. c. 5.
4 Ann. c. 16.

the court here express the causes following, to wit, that the said *John* in his plea aforesaid did not traverse the matter in the avowry and cognisance aforesaid, when he ought to traverse that matter, as they said; and because the matter of that plea was not issuable nor triable, and because that plea was insufficient and wanted form, and thereupon the said *John W.* said that the plea aforesaid by him the said *John* above in bar to the avowry and cognisance aforesaid pleaded, and the matter in the same contained, were good and sufficient in law to preclude the said *Francis, Henry, George, William* and *Henry* from having their avowry and cognisance aforesaid; which said plea, and the matter in the same con-

Joinder in
demurrer.

tained, the same *John* was ready to verify
 and prove, as the court, &c. And because
 the said *Francis, Henry, George, William* and
Henry to that plea did not answer, nor
 hitherto in any wise deny it, the same *John*
 as before prayed judgment and his damages
 aforesaid, by reason of the caption and un-
 just detention of the cattle aforesaid, to be
 adjudged to him, &c. And because the
 court of the said lord the king here were
 not advised to give their judgment of and
 upon the premisses, day therefore was given
 to the parties aforesaid before the said lord
 the king from the day of *Easter* in 15 days,
 wheresoever, &c. to hear their judgment
 of and upon the premisses, because the
 court of the said lord the king thereof,
 &c. On which day before the lord the
 king at *Westminster* came the parties afore-
 said, by their attornies aforesaid; where-
 upon all and singular the premisses being
 seen, and by the court of the said lord the
 king fully understood, and mature delibe-
 ration being thereon had, it was considered
 that the plea aforesaid by him the said *John*
 above in bar to the avowry and cognisance
 aforesaid pleaded, was good and sufficient
 in law to maintain him the said *John* to
 have his action aforesaid against them the
 said *Francis, Henry, George, William* and
Henry: wherefore it was also considered,
 that the said *John* ought to recover his da-
 mages against them the said *Francis, Henry,*
George, William and *Henry*, by reason of
 the caption and unjust detention of the
 cattle aforesaid; but because it is not known
 what damages the said *John* hath sustained
 by

Judgment for
 the plaintiff.

Inquiry.

by the reason aforesaid ; therefore we command you, that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what damages the said *John* hath sustained, as well by reason of the premisses as for his costs and damages by him about his suit in this behalf expended ; and the inquisition which you shall thereupon take, send to us wheresoever, &c. under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness *Edmund Herbert*, knt. at *Westminster*, the 17th day of *May* in the second year of our reign.

The manner of entering an inquisition in replevin, according to the statute of 17 Car. 2. upon a judgment for the avowant upon a demurrer, where a writ of inquiry was awarded to inquire of the value of the distress, and a judgment thereon.

After awarding the inquiry, and the words,
The same day is given to the (plaintiff) to be there, &c. you say thus :

AT which day the said *T. R.* (*i. e.* the plaintiff) comes before our sovereign lord the king at *Westminster*, by his attorney aforesaid, and the sheriff (to wit) *J. A. esq;* returns an inquisition taken before him at the castle of *York* in the county aforesaid, on the 30th day of *March* in the eighth year of the reign of his present majesty, whereby it is found that the said six hogf-

* Note; when the goods are inanimate, they say, were worth so much; if animate, were of such a price.
 † These words are where the distress doth not amount to the value of the rent.

heads of allum, at the time of the taking thereof * *were worth 100 l.* according to the true value thereof; therefore it is adjudged, that the said *T. R.* do recover against the said *J. M.* the said 100 l. for the value of the said six hogsheds of allum † *part of the said rent*, being in arrear as aforesaid, found by the said inquisition in the manner aforesaid, and his damages sustained by reason of the premisses here adjudged by the said court of our said sovereign lord the king, according to the form of the statute in such case made and provided, to the said *T. R.* to 80 l. with his consent, for his expences and costs laid out by him about his suit in this cause, which said value, expences and costs, do in the whole amount to 180 l. and be the said *J. M.* amerced, &c.

1 Saund. 195.

An inquisition and judgment upon the same statute, upon a judgment on a demurrer for the avowant, and a writ to inquire of the monies in arrear, and of the value of the distress, and judgment thereon.

After the judgment upon the demurrer that the plea in bar to the avowry is insufficient, concluding, *that the plaintiff take nothing by his writ, but be amerced for his false complaint, and that the defendant is dismissed the court,* you go on thus :

AND thereupon they the said *T. A. W.* and *T.* according to the form of the statute in such case made and provided, pray his majesty's writ to be directed to the sheriff of the county aforesaid, to inquire what monies were in arrear for the rent aforesaid, at the time of the distress made as aforesaid, and the value [or price] of the cattle taken ; therefore the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick he diligently inquire what sums of money were in arrear for the rent aforesaid at the time of the distress made, and what was the value of the cattle distrained according to the true value thereof ; and the inquisition which, &c. the sheriff should return, or make appear here in three weeks from the day of *St. Michael*, under the seal, &c. and the seals, &c. at which day *T. A. W.* and *T.* came here by their said attorney, and the sheriff, (to wit) *Sir R. M. knight* and

and baronet, now returns an inquisition taken before him at the castle of *York* in the county aforesaid, on the 6th day of *August* last past, by the oath of twelve good and lawful men, whereby it is found that the said sums of money in arrear for the rent aforesaid, to the said *T. L.* at the time of the distress were 39 *l.* and that the cattle distrained, according to the true value [or price] thereof, were worth 38 *l.* Therefore it is adjudged, that the said *T. A. W.* and *T.* do recover against the said *R. P.* the said 38 *l.* for the value of the cattle aforesaid, being part of the rent in arrear as aforesaid, found by the said inquisition in the manner aforesaid, and his damages by reason of the premisses, by this court adjudged to the said *T. A. W.* and *T.* at their request, by the discretion of the justices here, for his expences and costs laid out by them in this suit, according to the form of the statute in such case made and provided, to 10 *l.* which value, expences and costs, do in the whole amount to 48 *l.* &c.

1 Saund. 286,
287.

Retorno habendo.

A *retorno habendo* after judgment for the defendant, upon a demurrer in replevin.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting: whereas *J. S.* late of the parish of *St. Clement's Danes* in your county, esq; was summoned to be in our court before us, to answer to *W. P.* esq; of a plea, (or in an action) wherefore on the 14th day of *October* in the first year of our reign, at the parish of *St. Clement's*

Clement's Danes in your county, in a certain place there, called a *chamber in Devereux court*, he took the goods and chattels of the said *W.* (to wit) one bed, one bedstead, &c. [*so naming the goods*] and unjustly detained them against sureties and pledges, until, &c. and the said *J. S.* came into our same court before us, and alledged and pleaded, that the said *William* ought not to have or maintain his said action thereof against him, because he said, that as to the one bed, one bedstead, [*repeating part of the goods*] part of the goods and chattels aforesaid in the said declaration mentioned, that the property of those goods and chattels at the aforesaid time of taking them were the property of the said *J.* and this he was ready to verify; and as to one couch, ten other books, [*so naming the goods to which he pleads this plea*] residue of the said goods and chattels in the declaration of the said *W.* mentioned, the said *John* pleaded, that at the time of taking those goods and chattels the property of them was in and belonging to one *R. F.* without that, that the property of the said residue of the goods and chattels in the declaration mentioned, at the time when, &c. was the property of the said *William*, as by the said declaration above was supposed: and this he was ready to verify and prove; wherefore he prayed judgment, if the aforesaid *William* ought to have or maintain his said action against him for the same, &c. and he also prayed a return to be adjudged to him of all the goods and chattels aforesaid, together with his damages, expences and costs laid

out by him about his suit in that behalf, and the said *William* replied, that the plea of the said *John* above pleaded, and the matter therein contained, were not sufficient in law to preclude the said *William* from having his said action against the said *John* for the same, and that he was not under a necessity, nor was bound by the law of the land to answer in any manner to that plea, in the manner and form as the same was pleaded; which he was ready to verify; wherefore, for want of a sufficient answer in that behalf, he the said *William* prayed judgment, and his damages occasioned by the taking and unjustly detaining the goods and chattels, to be adjudged to him, &c. and the said *John* rejoined, that the plea aforesaid by him pleaded, in the manner and form aforesaid, and the matters therein contained, were good and sufficient in law to preclude the said *William* from having his action aforesaid thereof against the said *John*; which plea, and the matters therein contained, he the said *John* was ready to verify and prove, as the court should require; and because the said *William* had not answered to that plea, nor in any wise denied the same, he the said *John*, as above, prayed judgment, and a return of all and singular the goods and chattels aforesaid, together with his damages, &c. to be adjudged to him, &c. and such proceedings were thereupon had in our same court before us, that it was adjudged, that the said plea by him the said *John* above pleaded, and the matters therein contained, were good and sufficient in law to preclude the aforesaid

William

William from having his said action against the said *John*; and it was also considered by our same court before us, that the said *W.* should take nothing by his said writ, but for his false claim therein should be in mercy, (or *amerced*) &c. and that the afore-said *J. S.* should go thereof without a day, (or *should for ever be dismissed the court*), &c. and that he should have a return of the goods and chattels afore-said, to be delivered to him for ever irreplegiabie: and further, it was considered in our said court before us, that the afore-said *John* ought to recover his damages against the said *W.* by reason of the premisses: therefore we command you, that without delay you cause the said *John* to have a return of the goods and chattels irreplegiabie, and that you shall not deliver those things of which you have made mention, which belong to the complaint of the said *William*, without our writ, which shall expressly mention the said judgment; and in what manner you shall execute this writ, do you make appear to us, where-sover we shall then be in *Great Britain*, on

We command you likewise, that by the oath of 12 honest and lawful men of your bailiwick, according to the form of the statute in that case made and provided, you diligently inquire what damages the said *John* hath sustained, as well by reason of the premisses, as for his expences and costs laid out by him about his suit in that behalf; and the inquisition which you shall take thereon do you return to us at the day afore-said, where-sover we shall then be in
Great

Great Britain, under your seal, and the seals of those by whose oath you shall take such inquisition, together with this our writ to you directed for that purpose. Witness *Robert Lord Raymond, &c.*

The return of a *return' babend'* and a writ of enquiry by the bailiff of the liberty, and a *non omittas* and a *capias* awarded.

AT which day comes here the said defendant by his attorney aforesaid, and the sheriff, (that is to say) *W. H. esq;* now returneth here, that in order to have an execution of the writ aforesaid to him directed, he made a mandate to Sir *John Hobbart*, knight and baronet, bailiff of the liberty of our sovereign lord the king, of his duchy of *Lancaster* in the county aforesaid, who hath full power of returning all writs, and of executing the same within the liberty aforesaid, to whom the execution of the writ aforesaid doth entirely belong to be made; for that no execution of the writ aforesaid, within the liberty aforesaid, in his bailiwick, could be made by him, which bailiff made a return to the said sheriff, upon the mandate aforesaid, that before the coming of the mandate aforesaid to his hands, the cattle, goods and chattels aforesaid were eloined by the said plaintiff to places to the said bailiff unknown, so that he could not cause the cattle, goods and chattels aforesaid of the said (*defendant*) to be returned, as by the warrant aforesaid he was commanded; the said bailiff also returned, to the said sheriff an inquisition taken before him at *F.* within the liberty aforesaid in the county aforesaid, on the 1st day of *October* last past, by the oath of twelve, &c. by virtue of the warrant aforesaid

said directed by the sheriff upon the writ
aforesaid to the said bailiff, by which it was
found, that the said defendant sustained da-
mage by reason of the premisses, besides
his costs to and for those costs and
charges to Therefore it is ad-
judged, That the said defendant do recover
against the said plaintiff his damages afore-
said to by the inquisition found
in the manner aforesaid; and also

pounds to the said defendant. at his request,
for his costs and charges aforesaid, adjudged
by the court by way of increase, which da-
mages do in the whole amount to

£c. And hereupon the sheriff is com-
manded, that he do not omit, by reason
of any liberty of the duchy of *Lancaster*
aforesaid; but that of other cattle, goods
and chattels of the (*plaintiff*) to the value
of the cattle, goods and chattels aforesaid
before taken, he take *in withernam*, and
deliver them to the said defendant, to be
detained by him until the cattle, goods and
chattels aforesaid before taken be delivered
by the (said plaintiff) and in what man-
ner, £c. the sheriff shall make appear,
£c.

GEORGE the second, £c greeting: *A return'*
Whereas *A. B.* lately in our court be- *habend' a-*
fore us at *Westminster*, was summoned to *gainst the*
answer to *C. D.* in an action, wherefore he *plaintiff, for*
took nine cows, the cattle of him the said *d fault of his*
C. and unjustly detained them, against sure- *plea in bar to*
ties and pledges, £c. and the said *A.* ap- *an avowry.*
pearing in our same court before us, for a *Thef. Brev.*
certain reason by him alledged in our same *220.*
court,

court, in his own right, and the right of *S.* his wife, well avowed the taking of the said cattle in the place in which, &c. to be just, for 9*l.* rent due and in arrear from him the said *C.* to the said *A.* and *S.* for one half year, ending at the feast of the annunciation of the Blessed Virgin *Mary* next before, &c. [*as in the avowry*] for one messuage, &c. with the appurtenances in *W.* demised by them the said *A.* and *S.* to the said *C.* whereupon the said *C.* though solemnly called, did not appear, nor doth further prosecute his said writ; wherefore it was considered in our same court before us, That he and his pledges for prosecuting should be amerced, and that the said *A.* might depart the court thereon without a day, and should have a return of the said cattle: therefore we command you, that without delay you return the said cattle to the said *C.* and you shall not deliver them at the complaint of the said *R.* without our writ, which shall expressly mention the said judgment; and in what manner you execute this writ, you make appear to us in three weeks from the day of *St. Michael*, wheresoever, &c.. and have you there this writ. Witness, &c.

A return' habent' upon a judgment against the plaintiff by default.
Lilly's Entr.
 637.

GEORGE the second, &c. greeting: Whereas *T. E.* lately in our court before us at *Westminster*, was summoned to answer to *R. B.* in an action wherefore he took seven cows, the cattle of him the said *R. B.* and unjustly detained them, against sureties and pledges, &c. as he alleged; and the said *R.* afterwards made default

default in our said court before us ; wherefore it was considered in our same court before us, that he and his pledges for prosecuting should be amerced, and that the said *T.* might depart the court without a day, and should have a return of the cattle aforesaid : therefore we command you, That without delay you return the said cattle to the said *T.* and you shall not deliver them at the complaint of the said *R.* without our writ, which shall expressly mention the said judgment ; and in what manner you execute this writ, you shall make appear to us in three weeks from the day of *St. Michael*, wheresoever, &c. And have you there this writ. Witness, &c.

Second deliverance.

K. B.

GEORGE the second, to the sheriff of *Essex*, greeting : If *T. W.* shall give you security that he will prosecute his claim, and also to return the cattle, (* which in our court before us were lately adjudged to *T. J.* through the default of the said *T. W.*) if a return thereof shall be adjudged ; then do you cause those cattle without delay, (or *forthwith*) to be delivered to the said *T. W.* and by sureties and safe pledges compel the said *T. J.* that he be before * us in three weeks from the day of *St. Michael*, wheresoever we shall then be in *England*, to answer to the said *T. W.* for taking and unjustly detaining the cattle aforesaid ; and have

A writ of second deliverance.
Thes. Brev.
503.

have you there the names of the pledges, and this writ. Witness *Philip Lord Hardwicke*, the 28th day of *November* in the ninth year of our reign.

K. B.

Another
form.
Thes. Brev.
303.

GEORGE the second, &c. To the sheriff of *Essex*, greeting : If *C. D.* shall give you security that he will prosecute his claim, and also return the cattle which in our court before us were lately adjudged to *A. B.* through the default of the said *C.* we command you, that if by means of our writ *de retorn' habendo* lately directed to you for that purpose, you have made a return of the said cattle to the said *C. D.* then do you cause them to be delivered to the said *C. D.* and by sureties and safe pledges compel the said *A.* that he be before us on the octaves of *St. Hilary*, where-soever we shall then be in *England*, to answer to the said *C.* for taking and unjustly detaining the cattle aforesaid ; and have you there the names of the pledges, and this writ. Witness, &c.

K. B.

The entry of
an award of
this writ.

T^{F.} by *A. B.* his attorney, offers (or tenders) himself on the 4th day against *W. T.* of a plea, (or in an action) wherefore he took the cattle of the said *W. T.* and unjustly detained them, against sureties and pledges ; and he came not, and the plaintiff was there, &c. therefore he and his pledges, to wit, *John Doe* and *Richard*

Richard Roe, are amerced, &c. and the *Misericordia*.
 said *T. F.* may depart the court therefrom
 without a day, &c. and may have a re- *Sine die*.
 turn of the cattle aforesaid, &c. and af-
 terwards, (to wit) on the octaves of *St.*
Martin then next following, before our
 sovereign lord the king at *Westminster*,
 comes the said *W.* by *J. B.* his attorney,
 and, by virtue of the statute in such case
 made and provided, prays his majesty's
 writ of *second deliverance*, &c. and it is
 granted him, &c. returnable on the octaves
 of *St. Martin*, wheresoever, &c. the same
 day is given to the said *T. F.* &c.

*The difference between this writ in the com-
 mon pleas from the former, is no otherwise
 than at the first asterisk in the first writ be-
 fore, you say, which in our court before
 our justices at Westminster were adjudged* *Thes. Brev.*
to T. J. through the default of the said 303.
*T. W. And at the second asterisk you say,
 that he be before our justices at West-
 minster, in three weeks from the day of
 St. Michael, to answer, &c.*

C. B.

GEORGE the second, &c. To the she-
 riff of *Essex*, greeting: Because *Lewis*
B. in our court before our justices at *West-*
minster, hath given you security that he
 will prosecute his claim, and will also
 make a return of those cattle which in
 our same court were adjudged to *Stephen*
R. through the default of the said *L.* if
 a return thereof be adjudged to him:
 T there-

A writ of se-
 cond deliver-
 ance after bail
 taken.
Offic. Brev.
 348.

therefore we command you, that without delay you cause a mare which you have taken *in withernam*, of the cattle of the said *L.* to the value of the cattle formerly taken, to be delivered to the said *L.* and compel the said *S.* by sureties and safe pledges, that he be before our justices at *Westminster* on the octaves of *St. Hilary*, to answer to the said *L.* for taking and unjustly detaining the cattle aforesaid; and have you there the names of the pledges, and this writ. Witness *Sir Thomas Reeve*, Knt. the 28th day of *November* in the ninth year of our reign.

The return of
a writ of se-
cond deliver-
ance.

BY virtue of this writ to me directed, I have caused to be delivered to the within named *L.* his cattle within mentioned, as I am within commanded to do: the pledges within named are *John Denn* and *Richard Fenn*.

J. D. Esq; sheriff.

Capias in Withernam.

GEORGE the second, &c. To the sheriff of *Suffolk*, greeting: Whereas we lately commanded you by our writ, that whereas *T. B.* gentleman, had been attached by our writ of second deliverance, to appear in our court before us, to answer to *J. S.* in an action, wherefore he took the cattle of the said *J.* and unjustly detained them against sureties and pledges, and the said *J. S.* in our same court made default; wherefore it was considered in our same court, that the said *T. B.* should depart

depart hence without a day, and that the said *J. S.* and his pledges for prosecuting should be amerced; and that the said *T. B.* should have a return of the cattle aforesaid irreplegable; and that you without delay should make a return of those cattle to the said *T. B.* to be detained by him irreplegable; and in what manner you should execute that writ, you should make known to us [*such a return*] wheresoever we should then be in *England*; and you at that day returned to us, that the cattle aforesaid were cloined by the said *T. S.* to places unknown to you, so that you could not return or deliver those cattle to the said *T. B.* as you was commanded by the said writ; therefore we command you, that you take so many cattle of the said *J. S.* to the value of the cattle aforesaid, before taken by the said *J. S.* in *withernam*, and deliver them to the said *T. B.* to be kept by him irreplegable, until you can make a return of those cattle before taken, to the said *T. B.* and in what manner you shall execute this our mandate, do you make appear to us on the octaves of *St. Hilary*, wheresoever we shall then be in *England*; and that you cause further to be done therein, what of right, and according to the laws and customs of this our kingdom of *Great Britain*, we shall see meet to be done; we also command you, that if the said *T. B.* shall make you secure of prosecuting his claim, and of returning the chattels aforesaid, if a return thereof should be adjudged, then do you compel the said *J. S.* by sureties and safe

T 2 pledges

pledges, that he before us [*such a return*] wheresoever we shall then be in *England*, to answer as well to us for the contempt, as to the said *T. B.* for his damage and injury done him in this case; and have you there this writ. Witness, &c.

*A capias in
withernam,
upon a writ
of pluries re-
plegiari fa-
cias.*

GEORGE the second, &c. To the sheriff of *E.* greeting: Whereas we have often commanded you, that you should justly and without delay grant a replevin to *R. E.* of his chattels (to wit) of those which *T. T.* and *J. C.* had taken and unjustly detained (as it is said) according to our writ before delivered to you, or that you should be before us [*such a return*] wheresoever we should then be in *England*, to shew us a reason, why you neglected to execute our mandates so often directed to you: and you at that day made a return to us, that the chattels aforesaid were eloigned by the said *T. T.* and *J. C.* out of your bailiwick to places to you unknown, so that you could in no wise grant a replevin thereof to the said *R.* Therefore we command you, &c. [*as in the former*].

*A capias in
withernam,
upon a retor-
num habendo,
after an a-
vowry and a
ca sa. against
the party for
the damages.*

The declara-
tion.

GEORGE the second, &c. To the sheriff of the city of *G.* greeting: Whereas *J. P.* was lately summoned in our court before us, to answer to *J. W.* of a plea [*or in an action*] wherefore he on the 28th day of *April* [*in such a year*] at the city of *G.* (to wit) in a place there called *P.* had taken the cattle of the said *J.* to wit, twenty sheep, and impounded and unjustly detained them, against sureties and pledges, until,

until, &c. (as he declared); and the said
 J. P. appearing in our said court, for a
 certain reason therein alledged by him,
 well avowed the taking of the said cattle
 in the said place where, &c. to be just,
 &c. for damage-feasant therein; and the
 said J. W. afterwards in our same court
 made default: wherefore it was consider-
 ed there, that they and their pledges for
 prosecuting should be amerced, &c. and
 that the said J. should be dismissed there-
 from without a day; and that he should
 have a return of the cattle aforesaid:
 therefore we lately commanded you, that
 you should without delay make a return
 of the cattle aforesaid to the said J. P. and
 that you should not deliver them at the
 desire of J. W. without our writ, which
 should expressly mention the judgment a-
 foresaid; and in what manner you should
 execute that precept, you should make
 appear to us [on the return] wheresoever
 we should then be in *England*; we also
 lately commanded you, that according to
 the statute in such case made and pro-
 vided, you should diligently inquire by the
 oaths of honest and lawful men of your
 bailiwick, what damages the said J. P.
 hath sustained, as well by reason of the
 premisses, as for his expences and costs
 laid out by him about his suit in that be-
 half; and that you should return to us at
 the time aforesaid, the inquisition which
 you should take thereon, under your seal
 and the seals of those persons by whom
 you should take the inquisition, together

The avowry.

Default.

Misericordia.

Sine die.

Return of the
cattle.

Second deli-
verance,

Elongata re-
turned by an

Inquisition.

The finding
of the jury,

Judgment.

Withernam.

Ca sa.

with this writ; and you at that day returned to us, that the said cattle had been eloigned by the said *J. W.* to places unknown to you; for which reason you could not return those cattle to the said *J. P.* and you also returned a certain inquisition taken before you in the city of *G.* in the county of the said city, on the 19th day of *April* [*in such a year*] whereby it was found, that the said *J.* had sustained damages by reason of the premisses, besides his expences and costs laid out by him about his suit in that behalf, to 10*s.* and for his expences and costs to 2*d.* Therefore it was adjudged, that the said *J. P.* should recover against the said *J. W.* his damages afore said found by the inquisition afore said; and also 10*l.* awarded by our court before us, to the said *J. P.* for his expences and costs by way of increase; which said damages in the whole amounted to 10*l.* 10*s.* 2*d.* and that the said *J. W.* should be amerced; therefore we command you, that you take so many cattle of the said *J. W.* in your bailiwick, *in withernam*, and without delay cause them to be delivered to the said *J. W.* to be detained by him irreplegiabie till he will make a return of the said cattle before taken to the said *J. B.* and in what manner you shall execute this our writ, do you make appear to us on the octaves of *St. Hilary*, wheresoever we shall then be in *England*: we command you also, that you take the said *J. W.* if he shall be found in your bailiwick, and keep him safely, so that

that you have his body before us at the
 time aforesaid, wheresoever we shall then
 be in *England*, to satisfy the said *J. P.* for
 the damages aforesaid ; and have you there then this writ. Witness, &c.

Thef. Brev.
 62.

PRACTICAL DIRECTIONS

As to the making of a distress for rent,
and suing a replevin.

THE landlord himself may make the distress: but it is generally made by some other person employed by the landlord for that purpose; in which case, the landlord must give to the person he employs, a warrant or authority in writing, called a warrant of distress, which is usually in the following form:

‘ To Mr. *A. B.* my bailiff, greeting :
 ‘ Distrain the goods and chattels of *C. D.*
 ‘ [the tenant] in the house he now dwells
 ‘ in, [or, on the premises in his possession]
 ‘ situate in ——— in the county of ———
 ‘ for ——— pounds, being two year’s rent,
 ‘ [or, as the case is] due to me for the
 ‘ same at *Michaelmas* [or, any other] day
 ‘ last ; and for your so doing, this shall be
 ‘ your sufficient warrant and authority.
 ‘ Dated the ——— day of ——— 17 ———.
W. T.

Ante 43.

Being legally authorized to distrain, you enter on the premises, and make a seizure of the distress. If the distress be made in a house, you seize a chair or other piece of
of

of furniture, and say, 'I seize this chair
 ' [or, whatever it be] in the name of all
 ' the goods in this house, for the sum of
 ' ——— pounds, being two year's rent
 ' [or, as the case is] due to me [or, to
 ' *W. T.* your landlord] at *Michaelmas* [or,
 ' any other] day last, [and if the distress
 ' be made by any other than the landlord,
 ' you add] by virtue of an authority from
 ' the said *W. T.* for that purpose.'

You then proceed to take an inventory
 of so many goods, as you judge will be
 sufficient to cover the rent distrained for,
 and also the charges of the distress. Hav-
 ing done this, you make a copy of the
 inventory, according to the following
 form :

' An inventory of the several goods and
 ' chattels distrained by me *A. B.* [the di-
 ' strainer] the ——— day of ——— in the year
 ' of our Lord ——— in the houses, out-
 ' houses, and lands [according to the case]
 ' of *C. D.* [the tenant] situate in ——— in
 ' the county of ——— [and if the distress be
 ' made by any other than the landlord,
 ' say,—by the authority and on the behalf
 ' of *W. T.* your landlord] for the sum of
 ' ——— pounds, being two years rent,
 ' [or, as the case is] due to me [or, to
 ' the said *W. T.*] at *Michaelmas* [or, any
 ' other] day last.'

In the dwelling-house :

One table,
 Six chairs, &c.

In the cow-house :

Six cows,
 Two calves, &c.

At

At the bottom of the inventory you subscribe the following notice to the tenant :

‘ Mr. C. D.

‘ Take notice, that I have this day distrained [or, that as bailiff to *W. T.* your landlord, I have this day distrained] on the premises abovementioned, the several goods and chattels specified in the above inventory, for the sum of — pounds, being two years rent [or, as the case is] due to me [or, to the said *W. T.*] at Michaelmas [or, any other] day last, for the said premises ; and that unless you pay the said rent with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand, the — day of — in the year of our Lord —.

W. T.

Ante 54.

A true copy of the above inventory and notice must either be given to the tenant himself, or left at his house ; or, if there be no house, on the most notorious place on the premises. And it is proper to have a person with you when you make the distress, and also when you serve the inventory and notice, to examine the inventory, and to attest, if there be occasion, the regularity of the proceedings.

The safest way is to remove the goods immediately, and in your notice to acquaint the tenant where they are removed : but it is now most usual to let them remain

main on the premisses, leaving a man in possession, till you are entitled by law to sell them, which is on the seventh day. Ante 53.

If the tenant require further time for the payment of the rent, and the landlord refuses to allow it, he must take a memorandum in writing from the tenant, in the following form :

Memorandum, That I *C. D.* do hereby consent and agree, that *W. T.* my landlord, who hath this day [or, who on the ——— day of ——— last] distrained my goods and chattels for rent, in a messuage or dwelling-house [according to the case] situate in ——— in the county of ——— shall continue in possession of my said goods and chattels in the said messuage or dwelling-house for the space of ——— from the date hereof; the said *W. T.* having agreed to forbear the sale of the said goods and chattels for the said space of time, to enable me to discharge the said rent. And I the said *C. D.* do hereby agree to pay the expences of keeping the said possession. As witness my hand the ——— day of ——— in the year of our Lord ———.

C. D.

This memorandum is made, that the *Ibid.* landlord may not be deemed a trespasser, which he otherwise would, for continuing in possession beyond the time, which is limited by act of parliament for the sale of the distress.

But if there be no allowance of further time, you search the sheriff's office, on the seventh

PRACTICAL DIRECTIONS, &c.

seventh day, to see if the goods have been replevied; if they have not, you repair to the premisses; where, if the rent and charges of the distress are not paid, you send for a constable and two sworn appraisers, who having viewed the goods distrained, the former must administer to the latter the following oath:

‘ You and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, [*the constable at the same time holding the inventory in his hand, and shewing it to the appraisers*] according to the best of your judgment. So help you God.’

You then indorse on the inventory, the following memorandum:

‘ Memorandum, that on the ——— day of ——— in the year of our Lord ——— G. H. of E^c. and J. K. of E^c. two sworn appraisers, were sworn upon the Holy Evangelists, by me L. M. of E^c. constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. As witness my hand,
L. M., constable.’

Present at the time
of swearing the said
G. H. and J. K.
as above, and witnesses thereto,

O. P.

P. S.

And

And after the appraisers have valued the goods, you go on with the indorsement on the inventory, as follows;

‘ We the abovenamed *G. H.* and *J. K.*
 ‘ being sworn upon the Holy Evangelists,
 ‘ by *L. M.* the constable abovenamed,
 ‘ well and truly to appraise the goods and
 ‘ chattels mentioned in this inventory, ac-
 ‘ cording to the best of our judgment, and
 ‘ having viewed the said goods and chat-
 ‘ tels, do appraise and value the same at
 ‘ the sum of — pounds. As witness our
 ‘ hands, the — day of — in the year
 ‘ of our Lord —.

G. H. }
J. K. } Sworn appraisers.

When the goods are thus valued, it is usual for the appraisers to buy them at their own valuation; and a receipt at the bottom of the inventory, witnessed by the constable, is usually held a sufficient discharge. But, if the distress be of considerable value, it is much more adviseable to have a proper bargain and sale between the landlord, the constable, the appraisers, and the purchaser.

The goods taken in distress being dis- Ante 53.
 posed of, you deduct from the amount of their produce the rent in arrear, and all reasonable charges attending the distress; after which, the overplus (if any) is to be returned to the tenant.

If the tenant means to replevy the distress, he must, within the time allowed him by the statute for that purpose, that
 is,

Ante 68.

is, within five days after he has notice of the distress, take with him two house-keepers, living in the city or county where the distress was made, and go to the sheriff's office of such city or county; where he must enter into a bond, with the two house-keepers as sureties, in double the value of the goods distrained, conditioned for the prosecution of a suit in replevin, against the distrainer, with effect; and for returning the goods, if a return thereof shall be awarded. Upon this, the sheriff will direct a precept to one of his bailiffs; and by that means, the possession of the goods will be restored to the tenant, to abide the event of the suit in replevin.

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U 2 cover-

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